

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 355.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

ANTONI SZARY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI, FILED APRIL 21, 1919.

CERTIORARI AND RETURN, FILED JUNE 5, 1919.

(27,072)

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United States Circuit Court of Appeals for the Second
Circuit.

ERIE RAILROAD COMPANY, Plaintiff-in-Error (Defendant Below),
against

ANTONI SZARY, Defendant-in-Error (Plaintiff Below).

TRANSCRIPT OF RECORD.

Error to the United States District Court for the Southern District of
New York.

[Stamp.] United States Circuit Court of Appeals, Second Circuit.
Filed Nov. 13, 1918. William Parkin, Clerk.

Writ of Error.

UNITED STATES OF AMERICA, ss.:

The President of the United States of America to the Judges of the
District Court of the United States for the Southern District of
New York, Greeting:

Because, in the record and proceedings, as also in the rendition
of the judgment of a plea which is in the District Court, before you,
or some of you, between Antoni Szary, plaintiff, and Erie Railroad,
defendant, a manifest error hath happened, to the great damage of
the said Erie Railroad Company, as is said and appears by its com-
plaint. We being willing that such error, if any hath been, should
be duly corrected, and full and speedy justice done to the parties
aforesaid in this behalf, Do Command You, if judgment be therein
given, that then under your seal, distinctly and openly, you send the
record and proceedings aforesaid, with all things concerning the
same, to the Judges of the United States Circuit Court of Appeals for
the Second Circuit, at the City of New York, together with this writ,
so that you have the same at the said place, before the Judges afore-
said, on the 18th day of September, 1918, that the record and pro-
ceedings aforesaid being inspected, the said Judges of the United
States Circuit Court of Appeals for the Second Circuit may cause
further to be done therein, to correct that error, what of right
and according to the law and custom of the United States
ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the
United States, this 19th day of August, in the year of our Lord one

thousand nine hundred and eighteen, and of the Independence of the United States the one hundred and forty-third.

ALEX. GILCHRIST, JR.,
*Clerk of the District Court of the
 United States of America for
 the Southern District of New
 York, in the Second Circuit.*

The foregoing writ is hereby allowed.

JOHN C. KNOX,
U. S. District Judge.

Summons.

United States District Court for the Southern District of New York.

ANTONI SZARY, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Hon. Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 22nd day of May, in the year one thousand nine hundred and seventeen.

ALEX. GILCHRIST, JR., *Clerk.*
 STEPHEN A. MACHCINSKI,
Plaintiff's Attorney.

Office and Post Office Address, 31 Nassau Street, Borough of Manhattan, New York City.

Complaint.

United States District Court, Southern District of New York.

ANTONI SZARY, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

Plaintiff complains of the defendant, by Stephen A. Machcinski, his attorney, and alleges on information and belief, as follows:

4 First. That at all the times hereinafter mentioned the defendant was and still is a foreign corporation, organized and

existing under and by virtue of the laws of the State of New Jersey, and as such operated a railroad in the State of Pennsylvania, New Jersey and elsewhere.

Second. That at all the times hereinafter mentioned, the defendant had a place of business in the City, County and State of New York and Southern District of New York, and was engaged in doing business in said City, County and State of New York and Southern District of New York.

Third. That there is a diversity of citizenship between the parties to this action and that this action is based upon facts involving Federal statutes.

Fourth. That at all the times hereinafter mentioned, plaintiff was employed by the defendant as a laborer at its railroad yard, at Pavonia Avenue, Jersey City, State of New Jersey.

Fifth. That at all of said times there was and still is in force and effect a General Statute of the United States, to wit: Chapter 149 of the laws of 1908, amended on or about April 5th, 1910, known as the Federal Employers' Liability Act, which was and is binding upon the plaintiff and the defendant herein.

Sixth. That at all of said times and particularly at the time and place where plaintiff was injured, defendant was a common carrier by railroad engaged in commerce between several and different States of the United States and Territories and between several and different States of the United States and foreign nations.

Seventh. That plaintiff, at the time he sustained the injuries hereinafter described, was employed by the defendant in such commerce.

5 Eighth. That it was the duty of the plaintiff to carry sand and ashes to the engines and ash pits.

Ninth. That on or about the 5th day of January, 1917, while plaintiff was so employed and while he was crossing the tracks at the defendant's yard, and without any fault or carelessness on his part but wholly and solely through the carelessness and negligence on the part of the defendant, its agents, servants and employees, plaintiff was caused to be struck by an engine causing him to receive severe and permanent injuries to his head, body and limbs, and to be otherwise severely and permanently injured.

Tenth. Plaintiff was injured without any fault or negligence on his part, but wholly and solely through the carelessness and negligence on the part of the defendant, its agents, servants and employees.

Eleventh. That by reason of the premises, plaintiff was made sick, sore, lame and disabled, his left leg being amputated below the knee, he was cut, injured and bruised; several of his muscles and ligaments were ruptured, torn and injured, his spine, back, arms, legs, body, face, hips and hands were cut, injured and bruised; his nervous system sustained a severe shock, and he was caused to suffer greatly in mind and body, and will so suffer for a considerable time to come and perhaps forever; he has been confined to his bed, he has been incapacitated from following his usual occupation from which he derived profit and support and will be so incapacitated for a con-

siderable time to come and perhaps forever; he has been permanently internally and otherwise injured, crippled and disfigured; he has been and will be put to expense for physicians, nurses, etc., to endeavor to cure and lessen the effect of his injuries, sustained as aforesaid, that said injuries are of a permanent character and he can never wholly recover therefrom; that he has been crippled and injured thereby for life.

Twelfth. That by reason of said injuries the plaintiff has been damaged in the sum of Forty thousand (\$40,000) dollars.

Wherefore, plaintiff demands judgment against the defendant for the sum of Forty thousand (\$40,000) dollars, together with the costs and disbursements of this action.

STEPHEN A. MACHCINSKI,

Attorney for Plaintiff.

Office and P. O. Address, 31 Nassau Street, New York City.

UNITED STATES OF AMERICA,

Southern District of New York, ss:

Antoni Szary, being duly sworn, deposes and says that he is the plaintiff in the within-entitled action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

his
ANTONI x SZARY.
mark.

Witnessed by
NALLIE BROZOPH.

Sworn to before me this 15th day of August, 1917.

JOHN V. RYBA,
Notary Public, N. Y. Co., 180.

7

Answer.

United States District Court, Southern District of New York.

ANTONIO SZARY, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

Defendant, by Stetson, Jennings & Russell, its attorneys, for its answer to the complaint herein, alleges as follows, upon information and belief:

I. Defendant denies the allegations and each of them contained in paragraph Third of the complaint, except that it denies that it

has any knowledge or information sufficient to form a belief as to whether there is a diversity of citizenship between the parties to this action.

II. Defendant denies the allegations and each of them contained in paragraph Sixth of the complaint, except that it admits that at the times mentioned in the complaint defendant was a common carrier by railroad engaged partly in commerce between the several and different states of the United States and foreign nations, and partly in commerce wholly intrastate and more particularly wholly within the State of New Jersey.

III. Defendant denies the allegations and each of them contained in paragraph Seventh of the complaint.

IV. Defendant denies the allegations and each of them contained in paragraph Eighth of the complaint, except that it admits
8 that one of the duties of the plaintiff was to carry sand to the engines.

V. Defendant denies the allegations and each of them maintained in paragraphs Ninth, Tenth and Eleventh of the complaint.

VI. Defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations or any of them contained in paragraph Twelfth of the complaint, except that it denies that the plaintiff has been damaged in the sum of \$40,000, or in any sum for which defendant is responsible.

VII. Further answering the complaint and as a defense thereto, defendant alleges that the accident and injuries to the plaintiff were caused or contributed to by his own negligence or want of care.

VIII. Further answering the complaint and as a defense thereto, defendant alleges that the accident and injuries to the plaintiff were the result of the risks of his employment which were assumed by him.

IX. Further answering the complaint and as a defense thereto, defendant avers and alleges that the plaintiff sustained the injuries referred to in the complaint in the State of New Jersey while in the employ of the defendant; that there was not at any time prior to the commencement of said action any express statement in writing either in the contract of employment or by a written notice by either of the parties thereto to the other that the provisions of Section II of Chapter 95 of the Session Laws of 1911 of New Jersey or of the amendments or supplements thereto should not apply to said contract of employment, which statute defendant hereby pleads, and that if and in so far as any Act of Congress affects or regulates the rights of the

parties hereto the amount of damages, if any, to which the
9 plaintiff would be entitled is the amount allowed, permitted and fixed by the said statutes of the State of New Jersey; and if and in so far as any Act of Congress purports or attempts to define, regulate or permit recovery herein, other than as allowed, permitted or fixed by the said statutes of the State of New Jersey, such Act of Congress would be and is invalid and void as contrary to the Constitution of the United States, for the reason that the same impairs the obligations of contract as well as for other reasons.

X. Further answering the complaint, and as a defense thereto, defendant alleges that prior to the commencement of this action and on or about the 19th day of January, 1917, the plaintiff brought an action in the Supreme Court of the State of New Jersey, County of Hudson, against the defendant to recover damages upon the same cause of action as that stated in the complaint herein and that said action is still pending and undetermined, and that by reason of said facts plaintiff ought not to have or maintain this action against the defendant.

Wherefore, defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

STETSON, JENNINGS & RUSSELL,

Attorneys for Defendant.

Office and Post Office Address, 15 Broad Street, Borough of Manhattan, City of New York, New York.

10

Bill of Particulars

STATE OF NEW YORK,

County of New York, ss:

David Bosman, being duly sworn, deposes and says that he is an officer of Erie Railroad Company, defendant in the above-entitled action; to wit: vice president and secretary thereof; that he has read the foregoing and knows the contents thereof, and that the same is true of his own knowledge, excepting as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

DAVID BOSMAN.

Sworn to before me this 19th day of September, 1917.

[SEAL.]

WM. H. BRUDER,

Notary Public, Bronx County, No. 38.

Certificate filed in New York County No. 77.

Bill of Particulars.

United States District Court, Southern District of New York.

ANTONI SZARY, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

Plaintiff, for his bill of particulars, alleges as follows:

First. The accident occurred upon the defendant's railroad tracks near a coal chute used for loading coal into tanks of different engines.

11 Second. The defendant, its officers, agents and employees, failed to give plaintiff proper warning by means of a bell, whistle or otherwise of the approach of the engine which struck him and caused his injury; that they were further negligent in failing to have a proper light upon said engine and also to have the yard sufficiently lit to enable the plaintiff to see the approaching engine which caused his injury.

Third. Plaintiff's left leg has been amputated below the knee and plaintiff received severe cuts, contusions and lacerations upon his head and face.

Fourth. The expenses for physicians and nurses, etc., amount to \$11 dollars.

Yours, &c.,

STEPHEN A. MACHCINSKI,

Attorney for Plaintiff, 31 Nassau Street, New York City.

To Stetson, Jennings & Russell, Attorneys for Defendant, Office and P. O. Address, 15 Broad Street, New York City.

12 UNITED STATES OF AMERICA,

Southern District of New York, ss:

Antoni Szary, being duly sworn, deposes and says that he is the plaintiff in the within-entitled action; that he has heard read the foregoing bill of particulars and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

his
ANTONI x SZARY.
mark.

Sworn to before me this 26th day of November, 1917.

MORRIS A. WAINGER,

Commissioner of Deeds, City of New York.

N. Y. County Clerk's No. 95.

13 *Judgment.*

United States District Court, Southern District of New York.

ANTONI SZARY, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

The issues in this action having regularly come on for trial before Hon. Judge Martin T. Manton and a jury, at a Term of this Court, held in the United States Court Room, in the Post Office Building

in the Borough of Manhattan, New York City, on May 14, 15 and 16, 1918, and the issues having been duly tried and a verdict having been duly rendered on May 16, 1918, in favor of the plaintiff and against the defendant for the sum of Twenty thousand dollars (\$20,000) damages, and the interest on said verdict from said May 16, 1918, amounting to Nineteen and 73/100 dollars (\$19.73), and plaintiff's costs herein having been taxed by the Clerk of this Court at the sum of Thirty-three and 80/100 dollars (\$33.80),

Now, on motion of Stephen A. Machcinski, attorney for plaintiff, it is

Adjudged that the plaintiff, Antoni Szary, recover of the defendant, Erie Railroad Company, the sum of Twenty thousand dollars (\$20,000) his damages as aforesaid, and the interest thereon amounting, as aforesaid, to the sum of Nineteen and 73/100 dollars (\$19.73), together with the sum of Thirty-three and 80/100 dollars (\$33.80), his costs and disbursements, as aforesaid, amounting in all to the sum of Twenty thousand fifty-three and 53/100 dollars (\$20,053.53).

Dated, New York, May 22nd, 1918.

ALEX. GILCHRIST, Jr., *Clerk*.

14

Bill of Exceptions.

United States District Court for the Southern District of New York.

ANTONI SZARY, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

Before Hon. Martin T. Manton, U. S. C. J., and a Jury.

New York, May 14, 1918.

Appearances:

Stephen A. Machcinski, Esq., attorney for the plaintiff; John C. Robinson, Esq., of counsel.

Messrs. Stetson, Jennings & Russell, attorneys for the defendant; R. L. von Bernuth, Esq., W. C. Cannon, Esq., and C. D. Young, Esq., of counsel.

A Jury was duly empanelled and sworn.

Mr. Robinson opened to the jury on behalf of the plaintiff.

Mr. von Bernuth opened to the jury on behalf of the defendant.

Mr. Robinson: Is the foreman of the Erie yards, under whom Szary worked on the night of this accident, in court? If so, will you please take the stand?

15 THOMAS F. WEBB, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. What is your name, sir?

A. Thomas F. Webb.

Q. You and I never met before, did we?

A. No, sir.

Q. What is your business?

A. I am the engine dispatcher.

Q. Were you the engine dispatcher in the Erie yard the night of Szary's accident?

A. Yes, sir.

Q. And you had been in that position for how long, about, in time, before that night?

A. Since 1906.

Q. Well, now, you are familiar with the work that Szary had to do that night, are you not?

A. Yes, sir.

Q. What did you call him, what was he designated as?

A. Why, he was known as an engine sander.

Q. A what?

A. An engine sander.

Q. An engine sander, and that meant that he prepared sand to be used in the engines?

A. Yes, sir.

Q. All the engines that came into that yard?

A. Yes, sir.

Q. Engines running outside of the State of New Jersey, and some of them in it; is that right?

A. Yes, sir.

Q. And, by the way, sand is something that is absolutely necessary to have in any engine that is properly equipped, is it not?

A. Yes, sir.

Q. And what is it for?

A. Well, it is for starting out of stations, it is used on rails to start out of stations.

Q. And it is so placed in the engine that at the will of the engineer or fireman it can be dropped from the engine onto the car track rails, is it not?

A. Yes, sir.

16 Q. About how much of that sand is carried in the ordinary size locomotive? Is there any particular quantity, do you know?

A. Well, I should say about thirty pails to a box.

Q. Thirty pails in one engine?

A. Yes, but they are not always empty.

Q. What?

A. The boxes never become empty.

Q. Well, I mean that would be about the full amount of sand that the ordinary size locomotive would carry?

A. Yes.

Q. And it was a part of Szary's work to prepare this sand, get it ready for the engines, and if occasion required to place it in the engine itself, was it not?

A. Yes, sir. There were two others with him.

Q. What?

A. There were two others with him, three of them.

Q. Well, I mean it was a part, I said, a part of his work?

A. Yes, sir.

Q. To prepare that sand, and, if occasion required it, to put it in the engine himself?

A. Yes, sir.

Q. And that was his work all the time?

A. Yes, sir.

Q. That and that only?

A. That only.

Q. Preparing sand and placing it in these engines that haul freight cars all over the United States?

A. Yes, sir.

Q. Or outside the State of New Jersey, is that right?

A. Not freight cars, passenger trains.

Q. Well, both kinds sometimes?

A. Yes.

Q. I mean, he supplied engines that pulled cars?

A. Yes.

Q. That were engaged in traffic beyond the State of New Jersey, is that right?

A. Yes, sir; some engines, and some not outside.

Q. Yes. Now, just where was the place that he worked when he was working indoors?

A. Well, we have a coal pocket and at the west end of the——

17 Q. See if I cannot shorten this a little. He worked in what was known as the sand house?

A. Sand house; yes, sir.

Q. And he worked with how many others?

A. Two other men.

Q. Who were his companion workmen that night, do you know?

A. Well, I don't know their names.

Q. Would you know them if you saw them?

A. Probably I would.

Q. Do you see them in court? Look right behind where the plaintiff sits.

A. I think that fellow sitting on this side was working with him; I don't know the other fellow.

Q. You mean the second from the end, towards the door side?

A. The fellow with the red head.

Mr. Robinson: Stand up, you red-headed man, will you, please?

Q. That man, do you mean?

A. Yes, I think he was working there that night.

Mr. Robinson: What is your name?

The Man Standing: Justin Kishkel.

Q. Now, let us go into the sand house for a while. What work did Szary have to do in the sand house; that is, in the way of preparing that sand, getting it ready for these different engines?

A. Well, they have to dry the sand with stoves; they dry the sand and sieve it so as to take all the stones out of the sand, and it is thrown into a bin, and those men are there for to sand the engines that need it, that come down. There are three of them there together, and one man gets on the engine- and sands them, and the other man hands the pail up to another fellow to sand the engines. That was part of his work. Of course, all three of them were working there together.

Q. Yes, but was it not always a part of his work to take
18 care of—what do they call them, furnaces or stoves, that were used in the sand house to dry the sand?

A. Well, they are big stoves.

Q. Big stoves?

A. Big stoves; they were built for that.

Q. Were the stoves made especially for that particular kind of work?

A. Yes, they are big, round stoves that are made for that work, to dry sand; and then there is a big cover around them, where they shovel this sand in, and when the sand dries it gradually drops out itself onto the ground.

Q. The sand is really shovelled into a part of the stove, is it not?

A. Yes, it is shovelled into the outside.

Q. What fuel do they use there to keep those stoves hot?

A. Well, they used soft coal.

Q. That was a part of Szary's work, to feed those stoves, was it not, too?

A. Well, I could not say that; I could not say whether he done it or one of the other men done it, but some one done it.

Q. It was a part of some one of the three?

A. Yes, sir.

Q. That were engaged in the preparation of this sand?

A. Yes, sir.

Q. And Szary's keeping the stove in order would be in line with his general work, would it not?

A. Yes, sir.

Q. Now, you say soft coal was used?

A. Yes, sir.

Q. And a part of Szary's general work, too, would be cleaning out the stoves when that was necessary, would it not?

A. Well, I guess they do that in the daytime.

Q. I do not care when it is done; I say that was a part of his general work of getting this sand ready for these various engines, was it not?

A. Yes, sir.

Q. To keep his stoves clean?

A. Yes, sir.

19 Q. The stoves that heated the sand, is that right?

A. Yes.

Q. And was it not also a part of his work to remove the ashes of the burned coal?

A. Yes.

Q. From the stoves?

A. Now and then you have a pail of ashes, but there is not much ashes to it, you know.

Q. I did not ask you anything about it. I say, there is some ashes?

A. Yes, there are some ashes.

Q. Now, if you will just tell me what I want to know, we will get along much more quickly. I will ask you again, it was part of his work to remove the ashes from the stove, to clean the stove of ashes, was it not?

A. Yes, I suppose so.

Q. And those ashes taken from the stove or stoves were taken where?

A. Taken out and dumped outside.

Q. Taken completely out of the building, out of the sand house?

A. Yes, sir; taken out of the sand house.

Q. And some little distance from the sand house?

A. Yes, taken out and dumped.

Q. To what was known as an ash pit?

A. Yes, sir.

Q. Were they not?

A. Yes, sir.

Q. And in order to go from the sand house to the ash pit it was necessary to cross some tracks at some place, was it not?

A. Yes, sir.

Q. About how far would you say the ash pit was from the sand house; that is, the place where Szary would carry these ashes?

A. Oh, probably seventy feet.

Q. Seventy feet. Now, where was the place that the men got their drinking water about that time; you know that, of course, do you not?

A. Well, there are several places there to get it.

20 Q. Well, one place was right near what is known as the coal pocket, was it not, or in the coal pocket?

A. Yes, sir; it is in the west end of the coal pocket in the engine room.

Q. Well, without relation to just where it was located, it was near what is known as the coal pocket, was it not?

A. Yes, sir.

Q. The coal pockets. And it was a usual thing for men, too, in the course of their day's work, to go to that particular source of water and drink it there, was it not?

A. Well, I could not say that.

Q. Well, you often saw it done, did you not?

A. I have often saw what done?

Q. Well, you often saw it done, did you not?

A. I have often saw it done.

Q. And that is what it was there for, was it not, the water, for the men to drink?

A. Yes, sir; there was water there and there was water right across the track from it.

Q. Never mind. Tell me the things I want to know, Mr. Webb, please.

A. Yes, I understand; they do go to the engine room to drink, yes, to get a drink of water.

Q. That is what I mean, that was a regular thing for Szary and other men like him to do, to go to this water spout, or whatever it was, near the coal pocket, and drink there?

A. Yes, sir.

Q. That is something they did many times in the day and night in connection with their work, is it not?

A. Yes, sir.

Q. Were you on duty the night of this accident?

A. Yes, sir.

Q. What was the first you heard of it?

A. I picked him up from between the tracks.

Q. What time did his tour of duty begin that night?

A. Six o'clock.

21 Q. Do you know what he did that night before the accident?

That is, what work he did from the time he came on at six o'clock until about the time he was injured?

A. No, I saw him. I go around at six o'clock and see that they are on their jobs.

Q. Well, you found him on his job at six o'clock, didn't you?

A. Yes, sir; he was on his job at six o'clock.

Q. In the sand house?

A. Yes, sir.

Q. Did you notice what he was doing?

A. Well, they were drying sand and getting ready to dry sand, you know; getting things fixed up and getting their wheelbarrows in shape to wheel the sand to the fires, and things like that.

Q. Did you see him raking out or cleaning out any ashes that night?

A. No; I didn't see him. I did not stay there very long.

Q. You just looked in?

A. Just looked in.

Q. And saw that he was there, and went on about your business?

A. Yes, sir.

Cross-examination.

By Mr. von Bernuth:

Q. I show you a photograph and ask you whether that is a good representation of the coal pockets and sand house and the neighboring

ground, on the night of this accident on January 5, 1917 (handing witness photograph)?

A. Yes; that is the same as it was.

Mr. von Bernuth: I offer it in evidence.

By Mr. Robinson:

Q. Is the ash pit shown on this?

A. Yes, sir. This is the coal pocket, here is the ash pit here (indicating).

Mr. von Bernuth: I suggest that before the witness is interrogated on the photograph, it be either accepted or rejected.

22 Mr. Robinson: I wanted to find out what it was before I made up my mind.

The Court: What does he say? Does he say that it correctly represents it?

Mr. Robinson: I simply asked him if the ash pit was on it.

By Mr. von Bernuth:

Q. Does this show the ash pit lying to the north of the coal pockets as they existed on January 5, 1917?

A. The very same.

The Court: Received in evidence.

Marked Defendant's Exhibit A.

Q. Now, I show you Defendant's Exhibit A and ask you to mark with the letter "S" on the photograph the house which is known as the sand house, or which was known as the sand house on January 5, 1917.

A. Do you want me to mark it here?

Q. Mark it anywhere where we can see it. (The witness marks photograph.)

Mr. von Bernuth: The witness has marked the place indicated with the letter "S."

Q. Now, I ask you to mark the building which constituted the coal pockets on January 5, 1917, with the letter "C." (The witness marks photograph.)

Mr. von Bernuth: The witness has marked the place indicated with the letter "C." I will mark it a little heavier, Mr. Robinson, if you do not mind.

Mr. Robinson: You will do that right, I am sure.

Mr. von Bernuth: Yes, I will try to.

Q. Now, can you pick out on this photograph, Defendant's Exhibit

23 A, the house which is known as the engine room, at the west end of the coal pockets?

A. There it is (indicating).

Q. Mark that point with an "E," indicating it with an arrow; mark

it with an "E" up in the skyline and indicate the point with an arrow.
(The witness marks photograph.)

Q. Now, can you see the ash pits on Defendant's Exhibit A?

A. Yes, the four pits are right here together; you can see it up here, first, second, third and fourth pit (indicating).

Q. Are the ash pits on the second, third and fourth and fifth tracks to the right of the coal pockets as they appear on this photograph?

A. They are to the right, yes.

Q. And do they or do they not lie between the two telegraph poles on which there appear to be electric lights?

A. Yes, there is a light here and a light on this other pole (indicating).

Q. And there are engines standing on two of the ash pits as they are shown in this photograph, Defendant's Exhibit A?

A. Yes, the engines stand on the pits to get their fires cleaned and pan dumped, and then move off.

Q. Does the water tank show on this picture?

A. Just above the engine room you will see the water crane.

Q. In other words, it is just beyond the point which is marked "E" in this photograph?

A. Yes; just west of that.

Q. Now, will you mark that point with a "W," and indicate it with an arrow?

(The witness marks photograph.)

Q. Now, on either side of the sand house, was there a sand pit for storage purposes?

A. Yes, sir.

Q. From which the sand was taken into the sand house and put into the stoves to be dried?

A. Yes, sir.

24 Q. And after the sand was placed in the stove to be dried and had been dried and sieved, it was then thrown into bins?

A. Thrown into bins?

Q. And kept there until it was used.

A. Yes, sir.

Q. And these bins were located in the sand house?

A. The bins were located right in here, in this building here, you see (indicating on photograph).

Q. The building to the left of the sand house on the photograph?

A. Yes. There is your sand there, you see, and there is the sand there which is not dried, it is shown in the picture.

Q. And after the sand was sieved, it was taken from sand house proper and put in this little shed to the left of the sand house, where it was kept until it was used?

A. Where it was kept until it was used.

Mr. von Bernuth: May I show the jury this picture, your Honor?
The Court: Yes.

(Defendant's Exhibit A handed to the jury.)

Q. Some of the engines using this sand house to get sand went from New Jersey to places in New York and to the west, did they not?

A. Yes, sir.

Q. And some of them left Jersey City and went to other places in New Jersey?

A. Yes, sir.

Q. That is what their runs were?

A. Yes, sir.

The Court: What was that coal case in New York State that went to the Supreme Court, where it was decided, where they took coal for interstate engines and intrastate engines? Someone against the Lehigh Valley recently decided by the United States Supreme Court?

Mr. Robinson: I have that here.

25 The Court: Judge Brandeis wrote the opinion.

Mr. Robinson: A case in the State courts?

The Court: It came from the Court of Appeals of this State and went to the United States Supreme Court, somebody against the Lehigh Valley.

Mr. Robinson: Here is the case of Rousch against the Baltimore & Ohio Railway Company, which says persons injured attending a water tank, which water tank supplied both trains engaged in intrastate and those engaged in interstate traffic, held, to come under Federal Employers' Act.

The Court: What is that again?

Mr. Robinson: Rousch against Baltimore & Ohio Railway, 243 Fed. Rep. 713.

The Court: There is a later case, decided by the Supreme Court of the United States, in the last volume of the U. S. reports; Judge Brandeis wrote the opinion, somebody against the Lehigh Valley. It is a case that came from New York State and went to the Supreme Court.

Mr. Robinson: Has that got into the reports yet?

The Court: Yes. That is where, up in Central New York, they were carrying coal to the coal pockets of the railroad company.

Mr. Macheinski: This is the same as this water tank. They took water for all engines, and here is sand prepared for all engines; they are identically the same.

Mr. Robinson: I think the principle in this case is exactly the same as the one in the case we are trying; the water was to be used indifferently in interstate engines and intrastate.

26 The Court: I have the report right here; 713, you say.

Mr. Robinson: Yes; Rousch.

The Court: That Supreme Court case held the other way.

Mr. Robinson: The other way.

The Court: Yes.

Mr. Robinson: Well, that Peterson case, I think the principle involved in that case would seem to me to warrant the holding in this case that this man was engaged in interstate commerce. The Peterson case was a case where a man was driving spikes in a bridge that carried both intrastate and interstate traffic.

The Court: Proceed. I will find that case during the noon recess.

By Mr. von Bernuth:

Q. Some of the engines that used this sand house for the purpose of getting sand were engaged in switching empty cars around the yard?

A. Switching them; yes, sir.

Q. Switching them around the yard?

A. Yes, sir.

Q. And some of the cars that these engines switched, that used the sand house, were cars that were carrying freight between points that were entirely within New Jersey, between Jersey City and Montclair and places of that sort?

A. Yes; that is in the freight yard, switch engines.

Q. The switch engines; and they came there to this sand house to get their sand, just like the other engines?

A. Yes.

27 Redirect examination.

By Mr. Robinson:

Q. The terminal of the Erie Railroad is in New York State, is it not, on this side of the river?

A. Well, the terminal is in Jersey City. Of course, they have a terminal in New York, too.

Q. I mean, that is the furthest point, that is the eastern end of the road, in New York City, is it not?

A. Yes, but we do not have—after you leave Jersey City, it is all done by boat, of course.

Q. Yes, certainly.

A. We call it the terminal at Jersey City. That is known as the terminal.

Q. Every ticket sold to a passenger on the Erie Railroad west of Jersey City permits him to come into Jersey City and gives him transportation right into this City of New York, does it not?

A. On the boats.

Q. I am not talking about what. I say, the Erie undertakes to carry anybody getting on west of Jersey City, right into New York City, does it not?

A. Yes, sir, I believe so.

Q. And all these engines pull cars that carry these people from Jersey, a great many of whom are on their way to New York City; is that right?

A. Yes, sir.

Q. And these engines that are used to switch empty cars around the yard in Jersey City, they switch these cars for the purpose of making up trains that contain some cars that go west beyond the State of New Jersey, do they not?

A. Well, switch engines—

Q. Well, is that so or not? Do you understand the question?

A. Let me hear what you said again.

Q. You said in answer to the railroad's lawyer, that Szary or this sand house supplied sand to some engines that were used just for the purpose of switching freight cars around the yard?

A. Yes, sir.

Q. The very freight cars that were switched by such engines as that, were freight cars that were used to carry freight away
28 beyond the State of New Jersey, were they not?

A. Some of them; yes, sir.

Q. What is the furthest point west of the Erie Railroad, do you know?

A. Oh, you can go to Salamanca or Buffalo.

Q. New York?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. And there is no doubt at all that Szary supplied some of those engines with sand at different times, is there?

A. No, sir; not a bit; too far away.

Q. What?

A. The engines that Szary sanded, the furthest any engine goes is Port Jervis. It is one division.

Q. Well, but Szary would furnish them with sand if they needed it, would he not? When they came to this end? That would depend on the condition of the sand bin in the engine?

A. On the New York Division.

Q. Yes, he frequently filled locomotives used on the New York Division?

A. Yes, sir.

Q. Trains that run from Jersey City through New York?

A. Yes, sir.

Q. That was a part of his daily work, too, was it not?

A. Yes, sir.

Recross-examination.

By Mr. von Bernuth:

Q. The Erie Railroad has a large number of stations in New Jersey, has it not?

A. Yes, sir.

Q. Probably fifty or one hundred stations?

A. Yes, sir.

Q. And trains that ran entirely in between points in New Jersey, never get out of New Jersey?

A. Yes, sir.

Q. Carrying passengers and freight in between points wholly in New Jersey?

A. Yes, sir.

29 Mr. Robinson: Does your Honor want to hear something of this case now?

The Court: No, I think it is distinguishable. All they held is

that where they brought coal from the other States and put it on the siding, that ended the interstate carriage.

Mr. Robinson: Yes. After that the movement was intrastate.

The Court: Yes, and they made the distinction there between fifteen days or seventeen days.

ANTONI SZARY, the plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows, through Mrs. Helen Maier, sworn as interpreter:

Direct examination.

By Mr. Robinson:

Q. Mr. Szary, you are the plaintiff in this action, are you not?

A. Yes.

Q. How old are you?

A. Forty-four years.

Q. You are a Polish man, are you not; you came from Poland?

A. Yes.

Q. And your accident happened in the Erie Railroad yards on January 5th, 1917, did it not?

A. Yes.

Q. For how long a time before the night of your accident had you been employed by the Erie Railroad Company in its Jersey City yard?

A. Three years with this company.

Q. Had you been doing the same work during all that time that you were doing the night that you were hurt?

A. No. I was with this company before but I was working at other work.

30 Q. Well, you remember the night that you lost your leg, don't you?

A. Yes.

Q. On that day, that night, you were working in the sand house, preparing sand to be placed in the different engines, were you not?

A. Yes.

Q. And how long before that night, had you been doing that particular work?

A. About a year and a half.

Q. Had you worked during that time always on the night watch?

A. At first I used to work in the daytime; afterwards they changed me to night work.

Q. For how long a time before the night of your accident, had you been on the night gang?

A. I do not remember exactly how long.

Q. Well, had it been some months or weeks, or as much as a year, do you think?

A. A few months.

Q. Now, tell the Court and the jury just what your night's work consisted of, what you did there every night?

A. I prepared the sand, I sifted the sand, I put it into the different engines, and I also carried it into the ash pit.

Q. What different engines do you mean; why do you say different engines?

A. They used to go to Chicago, to Philadelphia and to various points.

Q. The engines that you fed with this sand, is that right?

A. Yes, sir.

Q. That was the work you were doing there every day, when you worked in the daytime, and every night when you — working in the nighttime, was it not?

A. Yes; the same.

Q. And that was the work that you had done for two hours the night you were hurt, and right up until the time you were hurt, was it not?

A. Yes.

Q. What time did you go to work that night?

A. Six o'clock.

Q. Is that the time your work began generally every night?

A. Yes, regularly, from six o'clock at night until six in the morning.

Q. You say your work was preparing this sand. You mean by that, do you not, that you got the rough sand and heated it and screened it, do you not?

A. I took the rough sand and put it into the stove to dry it, and then we screened it, we sifted it.

Q. And every engine that went out of Jersey City or came into it had such sand as you prepared, did it not?

A. It has to have that kind of sand, because it cannot go up hill if it has not got this sand.

Q. Well, now, when you say you heated the sand, you mean by that that you kept the fires going in these stoves in which the sand was heated, do you not?

A. I put the coal into the stove, and kept it heated, so that this sand should dry.

Q. Well, it was a part of your work to make the fire, sometimes, was it not?

A. Sometimes I had to make the fires myself so that the stove should be heated and the sand should dry.

Q. Tell him to answer yes or no to my questions, where he can. It was a part of your work to feed these fires and keep them burning, was it not?

A. Yes.

Q. And also a part of your nightly work to clean out the ashes when the fire was burned out, was it not?

A. Yes.

Q. And a part of your nightly duty is to take the ashes from the stove and carry them to what were known as the ash pits, is that not so?

A. Yes.

Q. How far were these ash pits to which the ashes were carried, from the sand house in which the sand was burned or heated?

A. About thirty feet.

Q. Now, that was the work generally that you had been doing in the nighttime for about one year—did he say?

32 The Interpreter: A year and a half, I believe he said.

Q. For some months before this night you were hurt, was it not?

A. Yes.

Q. You went to work at six o'clock on the night of your accident?

A. Yes.

Q. What was the first thing you did?

A. I gave the engines the sand. I put the sand in the engines.

Q. How many engines did you feed with sand that night?

A. About seven before the hour that I was hurt.

Q. About seven?

A. Seven engines.

Q. Do you know what those particular engines were used for, any of them, where they were to go?

A. They went to Chicago, and to Philadelphia, and to other states.

Q. About how long before your accident had you fed the last engine with sand?

A. When I fed the last engine with this sand, that is the time that the accident happened.

Q. About how long in time before your accident had you fed this last engine with sand? Was it an hour, ten minutes, or how long? About what time were you run over, about what time of night?

A. Half-past nine.

Q. And about what time, by the clock, had you fed the last engine that you fed that night with sand?

A. Nine o'clock.

Q. And the accident happened about half an hour after you last put sand into an engine, did it not?

A. Yes.

Q. Well, after you fed the engine last with sand, then what did you do?

A. I took the ashes out of the stove. I cleaned the stove out and then I took the ashes and took them over to the ash pit.

Q. What did you put the ashes in, in what did you carry the ashes?

A. In a pail.

33 Q. And was that the way you had been doing it every night?

A. Every night.

Q. Now, tell the Court and jury just the route, road, walk, path, he would take in going from the sand house with the ashes to the place where he was to dump them in the ash pit?

Now, Miss, you can explain this to him; I want him to take and trace as well as he can, just the direction or pathway that he took in going from the sand house to the ash pit.

The Interpreter: Yes, I understand.

A. I went from the yard and across the tracks and went over to the ash pit.

Q. How many tracks did you have to cross to go to the ash pit?

A. Two tracks.

Mr. Robinson: Now, Miss, by "tracks," I mean two rails, that makes a track, two rails.

A. Two rails, one track.

Q. That would be one track?

A. Yes.

Q. You had to cross one track consisting of two rails, to go from the sand house to the ash pit, is that right?

A. Yes.

Q. Was there any way at all of your getting from the sand house to the ash pit without crossing that track?

A. I could not get there any other way but to cross the tracks.

Q. Well, you took your ashes from the sand house and went to the ash pit, you say, about nine o'clock, or was it half-past nine?

A. When I took the ashes from the sand house to the ash pit it was almost half-past nine; about three minutes were lacking.

Q. Well, you got to the ash pit, did you not, with your ashes?

A. Yes.

Q. And dumped the ashes in the pit, did you not?

A. Yes.

34 Q. Now, what did you do then?

A. Then I went to get a drink of water, and then the engine caught me.

Q. Where did you go to get your drink of water?

A. To the engine room, where the drinking water was.

Q. Tell us where that engine room was with relation to the ash pit that he left to go there?

A. Near the coal pocket, the engine room is near the coal pocket.

Q. Did you have to cross this same railroad track to go from the ash pit to the place where the drinking water was, that you crossed to go from the sand house to the ash pit?

A. Yes.

Q. Is this place that you are speaking of the place where you had gotten your drinking water during all the time you worked there in the sand house?

A. Yes.

Q. Was there any way to go from this ash pit to this drinking place without crossing this same track?

A. I could not get there any other way.

Q. Well, ask him to please answer yes or no, when he can. Just one word, if he can. Now, was there any other way of getting from the ash pit to the place where you get your drinking water, without crossing this same track that you crossed in going to the ash pit?

A. I had to cross the tracks.

Q. Won't you ask him to say yes or no to that, please? The answer to that is no, is it not?

A. No, that is what he said; no, I had to cross the tracks.

Q. I did not understand. All right. Now, begin again at the point where he had thrown the ashes into the pit. You say that you went then, you started for the drinking place. Did you cross the track and get to the drinking place and get your drink before this accident?

A. Yes.

Q. And what did you do after you got your drink?

A. I went for the pail.

35 Q. And in order to get your pail, was it necessary for you to again cross the track to go to the ash pit?

A. Yes.

Q. What kind of a night was it about that time, about the time that you were going back to the ash pit?

A. It was very dark and very foggy, and rainy and misty, and the steam was towards the ground so that you could not see anybody at all.

Q. Were there other movements of cars and locomotives around the neighborhood of where this accident was at that time? Were there movements of trains and locomotives generally in the yard at the time?

A. I could not see anything at all.

Q. Were there other cars or locomotives moving around in other places in the yard that night?

A. Further, there was, further away.

Q. Further away?

A. Further away.

Q. What was there in and around the yard that night? Was there any smoke or steam?

A. Yes, there was smoke and fog and mist, and also steam from the engines, and it was so dark that you could not see anything moving around.

Q. Was there any stationary light near the place where you had to cross this track to go from the drinking place to the ash pit?

A. No, there was no light there.

Q. Now, begin and tell us just what happened when you started from the drinking place to go back to the ash pit. Tell us what you did and what happened to you?

A. I went to get a drink of water, and then was going back and the train caught me.

Q. Well, what did you do when you started to cross the track before the train caught you?

Mr. von Bernuth: I object to that as leading in form. Ask him what he did. Ask him if he had a drink of water, or something of that sort.

36 The Court: Yes, what did you do after you got a drink of water? Go on.

Mr. Robinson: Well, I think, your Honor I am entitled to ask him what he did before the train caught him. It is pretty hard to get these foreigners to describe anything.

(Pending question read.)

Mr. Robinson: I want to bring him right down to that instant of time.

The Court: Go on, answer the question.

A. I went from the place where I had the drinking water. I looked around. There was not any engine or anything to be seen, and then I started to cross the rail. One track I crossed with one foot, and then when I wanted to cross the other one, the engine caught me.

Q. You say you looked around. What do you mean by that? In what directions did you look?

A. It was very dark, and I did not hear any signal, and I did not see any engine, so I was looking around.

Q. In what direction did you look before you crossed the track?

A. When I was crossing with one foot, I looked all around and I did not see anything and then as I tried to cross with the other foot, the train came on and caught me, and knocked me down.

Q. You looked around where? Did you look around back of you, or up in the air, or down at your feet, or what?

A. When I came out of the drinking place, I looked first this way, then I looked this way (illustrating).

Q. Well, which way, that is what I am trying to find out. He pointed to his right and he pointed to his left, did he not, Miss?

The Interpreter: No, he said, first, this way and then this way, and then this way; that means all around. And then he saw the pail—

37 Mr. Robinson: Wait a moment, Miss. Let us have those movements described, please. He indicated that he looked first directly ahead of him?

The Interpreter: Yes, sir.

Mr. Robinson: And then to his right?

The Interpreter: And then sideways.

Mr. Robinson: And then to the left?

The Interpreter: And then to the left.

Mr. Robinson: Both to the right and to the left?

The Interpreter: Yes; and then he saw his pail and he wanted to get his pail, and as he crossed with one foot—"First I crossed with one foot, and as I tried to cross with the other one, the other rail, the train caught me."

Q. When you looked to your right, did you see anything moving on the track which you were about to cross?

A. No, I did not see anything at all.

Q. Did you see anything moving on the track that you were about to cross when you looked in the other direction, to the left?

A. I did not see anything at all.

Q. Did you hear anything?

A. I did not hear anything, because further on there were a lot of engines moving, and there was a lot of noise.

Mr. Robinson: Wait a moment.

Mr. von Bernuth: Let him answer the questions.

Mr. Robinson: I want yes or no to that.

Q. Did you hear anything when you looked around, just before you crossed the track?

A. No.

Q. And how far across the track, counting the two rails as the track, did you get before anything happened?

38 A. I stepped about two feet over; when I stepped about two feet across the tracks, the accident happened.

Q. Well, what happened then?

A. It threw me over, and then it pushed me forward, and then when it came to a little sort of a hole, where the ties are higher than the rails, there I stayed.

Q. What do you mean, when you say "it" pushed me over; do you mean a locomotive?

A. Yes, the train.

Q. You said a little while ago, I think, at one time, that the train came and pushed you, or something to that effect. It was not a train that ran you down at all, was it? It was a locomotive only?

A. One engine.

Q. What?

A. One engine.

Q. And do you know how that engine was running, backwards or forwards?

A. Backwards.

Q. Did you lose consciousness at the time?

A. When it hit me, I got terribly frightened.

Q. Well, did you see whatever it was that hit you roll on and go beyond the point where you were struck?

A. When it knocked me down, I did not know anything further, because I fell unconscious. It knocked my head, and I fell unconscious. I do not know what happened afterwards.

Q. Do you know whether you were knocked down right at the place you were first pushed by the rear of the locomotive, or whether you were pushed forward some with the movement of the locomotive?

A. I fell down the minute that it touched me, and then it pushed me forward.

Q. Have you any idea about how much of a distance you were pushed forward before you stopped moving forward?

A. About ten feet.

Q. What is your idea of ten feet? Show it to us in this room.

A. From this wall to this gate here; from the wall to the gate.

39 Mr. Robinson: What is that, a distance of about ten feet? Juror One and Others: Yes, just about ten feet.

Mr. Robinson (measuring with two-foot ruler): Well, that is about ten, gentlemen. Where did he indicate? Well, he was probably two feet further back.

The Interpreter: He said from this wall to the gate.

Mr. Robinson: Yes, that would be three more.

Mr. von Bernuth: Twelve or thirteen.

Mr. Robinson: Twelve or thirteen feet, I should say.

Q. Well, did this object that knocked you down and pushed you and ran over you, after it ran over you, did it go some distance on and out of sight?

A. It went further. I don't know who took me off the rails, because when it knocked me——

Q. I did not ask that. Did this object that ran you down and injured you, travel on out of your sight as you lay there on the track?

A. It went further.

Q. Did it go out of your sight?

A. No.

Q. Did you see it when it stopped from where you lay?

A. I did not see anything, because the mud was in my eyes and I was unconscious, I could not see anything any more after that.

Q. Now, before you crossed this track and were struck did you hear any bell sounded from that locomotive?

A. None, none at all.

Q. Or any whistle sounded?

A. No.

Q. Nor any warning at all given of its approach?

A. No.

Q. Did you see any light on the front, or rather on the rear, of the engine that ran you down?

A. No, no light.

40 Q. Do you remember what was done for you while you were lying there?

A. I do not remember.

Q. Well, some man came and took you up, and you were brought to a hospital, were you not?

A. Yes.

Q. What hospital?

A. St. Francis Hospital.

Q. St. Francis Hospital in Jersey City?

A. Yes, sir.

Q. You were brought to St. Francis Hospital in Jersey City, were you not?

A. Yes.

Q. Was your leg cut off that night in this accident, or was it taken off in the hospital?

A. In the hospital they took it off.

Q. Do you know when it was taken off? Was it the same night that you were brought in there first, or afterwards?

A. The next day they showed me the leg, that it was amputated.

Q. Then you were operated on the night you were brought in, were you not?

A. Yes.

Q. Do you know about how long you stayed at the hospital?

A. Seven weeks.

Q. And then where did you go?

A. To Pavonia Street, Jersey City.

Q. Well, for how long after the time you were hurt, the night that you were hurt, were you kept indoors, either in the hospital or in your home?

A. Three months.

Q. Have you done any work or earned any money since your accident?

A. No, nothing at all.

Q. How much of your leg is gone?

Mr. von Bernuth: About four inches below the knee, is it not?

Mr. Robinson: It feels like about two and half, in here, to me, in back of the joint; more from the top of the knee down. Well, will we admit that it is gone from about three inches below the
41 knee?

Mr. von Bernuth: Yes.

Mr. Robinson: From two to three inches below the knee?

Mr. von Bernuth: Yes.

Mr. Robinson: The left leg.

The Court: We will take a recess now until two o'clock.

Recess.

Afternoon Session.

ANTONI SZARY, the plaintiff, resumes the stand:

Direct examination continued.

By Mr. Robinson:

Q. Mr. Szary, what pay were you getting at the time of your accident?

A. \$36 in two weeks.

Q. About \$18 a week?

A. Yes.

Q. What is the name of the man who holds your job today?

A. Justin Kishkel.

Q. Is he in court?

A. Yes.

Q. Now, Mr. Szary, do you have any pain in your leg, or any feeling of any kind now, in the stump of the leg that was injured?

A. (Moving knee.) The knee hurts me. You can hear it making a sort of a noise.

Cross-examination.

By Mr. von Bernuth:

Q. How many were there working with you in the sand house at the time that you were hurt?

A. Three.

Q. Two others beside yourself?

A. Yes, sir.

Q. And how many stoves did you have in the sand house to dry sand?

A. Three were in working order, and one was to be repaired, but only three were working.

42 Q. So that at the time of the accident you were working on three stoves drying sand?

A. Three were working and the fourth was to be fixed.

Q. Did you get the sand that you put in the stoves from a pile where the sand had been dumped from cars?

A. From the yard, they used to bring it to the oven, to the stove.

Q. You got the sand to put in the stoves from a pile where it was kept somewheres in the yard?

A. Yes.

Mr. Robinson: You are talking only generally now, I understand, Mr. von Bernuth?

Mr. von Bernuth: Yes.

A. (continued). They used to bring it into the yard with a train and there they dumped it and we brought it from there into the stoves.

Q. You got the sand from the place where the cars had already dumped the sand?

A. We brought it from the yard, where it was already dumped.

Q. Did you and the two others who were with you, were you the persons that brought this sand from where it had been dumped and put it in the stoves?

A. The three of us were working here, and the three of us used to bring it to the stoves from the yard.

Q. Before this accident happened you left the sand house with a pail of ashes to go and dump the ashes in the ash pit?

A. Yes.

Q. Did you go right over to where the ash pit was?

A. Yes.

Q. And did you dump the ashes in the pit?

A. Yes.

Q. And after you dumped the ashes did you leave the pail where you had been dumping the ashes?

A. Yes.

Q. And that was on the side of the ash pits or the end of the ash pit which was nearest the Hudson River?

A. Yes, the ash pit nearest the Hudson River.

43 Q. On that side, on the side nearest the Hudson River?

A. Opposite the river was the pit.

Q. Well, that was also the side that was nearest to the sand house?

A. Yes.

Q. And then after you left the pail there you went over to the engine house, which was on the hill side of the coal pocket?

A. Then I went over to the engine house to get a drink of water.

Q. And that was on the side of the coal pockets furthest away from the Hudson River?

A. The water was across the tracks.

Q. The water was across the tracks?

The Interpreter: That is the answer, yes, sir.

Q. Well, it was a rainy night, wasn't it?

Mr. Robinson: Oh, he means the place to get the water.

Mr. von Bernuth: To get the water?

Mr. Robinson: Yes, he does not mean that the water was on the tracks.

Q. Where the engine house was was on the side of the coal pockets or the end of the coal pockets away from the Hudson River?

A. The engine house was on this side and the shops were on this side, and the rails were here (indicating).

Q. Well, you had to cross that one track to get into the engine house?

A. Yes, sir.

Q. That is the track that runs along in front of the coal pockets?

A. Yes.

Q. And you walked along this track to get to the engine house from the ash pits?

A. After, from the water—I don't know what that means—from the water I crossed the track to where the pail was.

Q. Well, you walked from the ash pit to the engine house to get a drink, which was about as far as the coal pockets are long?

41 A. After I took a drink of water I went over to the ash pit to get the pail.

Q. Well, you got the drink of water in the engine house?

A. Yes.

Q. And then after you came out of the engine house?

A. Yes.

Q. And then you started to walk back to where you left the pail?

A. Yes.

Q. And how far had you walked towards your pail at the time that the engine hit you?

A. I don't remember exactly, my memory does not serve me just how many feet I walked.

Q. Well, it was some distance away from the engine house that the engine hit you?

A. Yes.

Q. And at the time the engine hit you you were walking towards the ash pit where you had left the pail?

A. Towards the pail.

Q. After you left the engine house or the engine room where you got the water and started to walk towards the ash pit where you had left your pail, did you look around, backwards?

A. Yes, I stopped and I looked one way and I looked another way,

and then I looked again in another way, but when I saw nothing I went ahead.

Q. Now, the time that you say you looked that was just after you came out of the engine house where you had gotten your drink?

A. Yes, about five minutes afterwards. I don't remember exactly whether it is two minutes or five minutes, but very soon, I do remember it was very soon afterwards.

Q. When you came out of the engine house you looked around?

A. Yes, I looked around.

Q. And then after you finished looking around you started going for your pail, where it was near the ash pits?

A. Yes.

Q. And after you had looked around and then started to
45 to walk towards your pail did you look around again until after you were hit?

A. When I stepped on the rail I looked around again and again, and I could not see anything; and then as I started to cross the other rail something hit me.

Q. Between the time that you looked around and the time that you were hit, where were you walking, between the rails of the track near the coal pocket, or outside of the rails?

A. Across the tracks.

Q. Well, there was only one track that you had to cross from the time you left the engine house to get back to where you left your pail?

A. Yes.

Q. And from where you left the engine house toward where your pail was, you had to walk about 175 feet, 150 to 175 feet?

A. No.

—, — you left the engine house where you had gotten the drink, to the point where you had left the pail?

A. I don't know how many; I don't know because I don't remember and I did not measure exactly the distance.

Q. At the time that the engine hit you, had you gotten to a point nearer to the pail than it was to the engine house which you had left?

A. It was about the middle, about the center.

Q. And where had you been walking from the time you left the engine house until you were hit at this point about halfway from the engine house to where the pail was?

A. I don't understand.

Q. In this space, from where you left the engine house to where you were hit, which was halfway toward the pail, where had you been walking; on the coal pocket side of the track, or in between the rails of the track, or on the ash pit side of the track?

A. From the coal pocket to the ash pit, on this side I was walking (indicating).

Q. Well, there was one track that you had to cross. Were you
46 walking on the coal pocket side of that track or in between the rails of the track, or on the side away from the coal pockets, outside of the rail?

A. Not on the side of the tracks, but across the tracks.

Q. On the coal pocket side?

A. From the side of the coal pocket I crossed to the side of the ash pit.

Q. Yes, but up to the time that you started across the tracks, you had been walking in between the track and the coal pockets?

A. From the coal pockets I walked a few feet, and then I crossed the tracks.

Q. You were hit as you started across the tracks, is that right?

A. Yes, as I crossed the tracks.

Q. And all the time before that you were on the coal pocket side of the track?

A. I was hit as I was crossing the tracks. With one foot I tried to cross and I was safe, and then when I tried to cross with —

— about the time the engine hit you, did you?

A. I the other one it hit me.

Q. I understand that. I am only asking you where did you walk? I want to know where you were walking before you started across the track, between that time and after you had come out of the engine house. Where had you been walking, between the coal pocket track and the coal pockets, or between the rails of the coal pocket track?

The Interpreter: He repeats again, "From the coal pocket."

Q. Did you at any time before the accident happened, and after you got your drink, walk on the side of the coal pocket track which was nearest the ash pits?

A. After I drank the water I tried to cross the tracks to the pail.

Q. And that was at a place about halfway toward where the pail was lying?

A. I don't remember exactly, as I did not measure the distance. I cannot remember it.

Q. Well, you did not start to cross the track until about the time the engine hit you, did you?

47 A. I crossed one rail and then when I tried to jump over the other rail it hit me.

Q. Did you at any time before you were hit walk between the track next to the coal pockets and the first ash pit track?

A. No, I did not walk in between the rails at all. I tried to cross them.

Q. You have not answered my question yet. I ask you, did you at any time before you were hurt walk between the track next to the coal pockets and the first ash pit track?

A. No.

Q. Do you know what I mean when I say the side or the end of the coal pockets nearest the sand house?

A. No, I do not understand.

Q. Do you know where you were hit along the track?

A. I don't remember just now. I don't remember any more where

the place was. I have a noise in my head from what I was hit by the engine. My head is not quite right; there is a loud noise in it.

Q. The ash pits are right next to the coal pockets, or were at the time you were working there?

A. Not far from there, but I don't remember how many feet.

Q. Well, they are right in front of the coal pockets; they were in January, 1917?

A. The ash pits are opposite the coal pockets.

Q. Yes, and that is the place where the engines come after they have been running, and dump their ashes from the fires?

A. Yes.

Q. And there are men there at the ash pits, with big sticks and other kinds of tools, who poke the ashes out of the fires and dump them into the ash pit below?

A. Yes.

Q. And there are several of those men working around the ash pits and there were several of those men working around the ash pits?

A. I did not see any men working around there. There were lots of engines standing around, but I did not see any men working.

48 Q. But that is the place where those men do work?

A. That is the place where the men are working, but I did not see any men around there.

Q. And in order to enable these men to see where they are working, there is an electric light at each end of the ash pits, or there was in January when you were hurt?

A. They have little candles with them; there is no light there at all.

Q. Is there not, or was there not in January, 1917, at the time you were hurt, lights up near the top of a pole at each end of the ash pits?

A. There is a light far away on the other side, but in this place there was no light at all.

Q. I am not talking about this place; I am talking about at each end of the ash pits, was there not a light on the top of a pole?

A. I don't remember.

Q. In other words you mean you did not notice whether there were lights there or not, is that right?

A. There was no light there.

Q. Well, was there not a light, or do you say that you do not remember whether there was? Which is it?

A. No, there was no one there.

Q. After you got your drink and started to walk for your pail, were there any engines on the ash pits?

A. Yes, there were some, from the end.

Q. And were any of those engines moving?

A. No, they stood still. There were no men around there, I didn't know whether they were cleaning or not, but there was nobody around.

Q. Were there any engines moving anywhere near where you were?

A. There was nothing moving around there; in fact I don't know

whether there was or not, because it was so very dark that you couldn't even see anything ahead of you.

Q. Did you hear any engines whistle or ring their bells on other tracks than the one that you were walking on, or near?

A. No.

49 Q. At the time that you were hurt, had you gotten as far the point where the switch goes away from the ash pit toward the coal pocket track?

A. I did not get as far as that. In fact when it caught me I don't know where I was at all.

Q. You were familiar with this place, I mean you had been working there for a year and a half?

A. Yes.

Q. And you knew all about where the tracks were and how they were situated and where the ash pits were?

A. I was not really familiar with the place, because I simply did the work that they told me to do. I did not take any notice of my surroundings.

Q. Well, you often went up to this house to get a drink while you were working during that year and a half before the time you were hurt?

A. It was not that I went there often, only when I got thirsty after my work, and it was not very far there from me, then I went in there and got a drink.

Q. Didn't you go up there once a day, anyway?

A. I did not go there specially, it is only when it was on my way and I was thirsty, then I stopped in and got a drink.

Q. And you had been doing that on and off for a year and a half before you were hurt, day and night?

A. Yes, when I was thirsty.

Q. Do you remember starting an action against this Erie Railroad Company in New Jersey, with New Jersey lawyers?

A. Yes.

Q. And do you remember you were examined as a witness at your house at 145 Pavonia Avenue, Jersey City, in April a year ago?

A. Yes, they examined me, but I was very sick then, and I really do not remember what I said.

Q. Do you remember that it was on or about April 10, 1917, about three months after the accident?

50 A. I don't remember exactly when it was. I did not put the date down, I did not write it down.

Q. Well, was it about three months after you were hurt?

A. Maybe it was three months, I don't remember exactly, I don't remember that it was not.

Q. Did you have a lawyer there named Mr. Finerty?

A. I don't know his name.

Q. Well, you had a lawyer there?

A. Yes.

Q. And the Erie Railroad Company had a lawyer there?

A. Yes.

Q. And you were examined through an interpreter, just as you are being examined today?

A. Yes.

Q. And do you remember being asked questions and giving answers, just as you are doing today?

A. I don't remember. I answered the questions, but I was very sick and I do not remember what I answered.

Q. Do you remember being asked this question by the lawyer for the Erie Railroad Company, and do you remember giving this answer?

Mr. Robinson: What page, Mr. von Bernuth?

Mr. von Bernuth: Page 17.

Q. (Continuing:) "Q. Why didn't you look to see if there was a train on that track on which you were hurt? A. It was a foggy night, and when I went out I looked around, did not see anything, did not hear any bell or whistle, and started to walk. The trains generally blow a whistle or ring a bell. This one did not do that."

The Court: There is no contradiction there, is there?

Mr. von Bernuth: The next question will show.

51 The Court: Ask him the next question, the one that there is contradiction of.

Mr. von Bernuth: I will ask the whole thing, and the interpreter can translate the whole thing. The next question——

Mr. Robinson: The next question is, "Did you look behind?"

Q. The next question is: "Q. Did this engine hit you in the back?

A. Yes. Q. Did you look behind to see if any engine was coming?

A. No. When I started to walk I did not see anything, and it hit me and knocked me down and cut my leg off. Q. After you started to walk you did not look behind to see if an engine was coming, did you?

A. When I walked out of the engine room I looked around, did not see any train, and in about three minutes the train ran me down.

Q. After you left the engine room and started to walk, after that did you look behind you to see whether an engine was coming? A. When

I walked out of the engine room and looked around down there, did not see any engines come, only I saw one come from the pit towards me, and I started to walk. I did not look around any more. Q. So you did not look in back of you as you walked along the track?

A. No. Then I did not look any more." I ask you whether those questions were asked you and whether you answered as I have read from this paper?

A. I don't remember. I don't think that this is as I have said. I don't believe that this is the way that it was translated. I was sick, and the interpreter came to me, and he translated, I don't know what he was translating. I was too sick to know anything.

Q. Well, did you understand what the interpreter translated from Polish into English?

A. He translated in Polish, but I could not understand his Polish very well.

52 By Mr. Robinson :

Q. Could not understand his Polish?

A. His Polish very well.

By Mr. von Bernuth :

Q. You did not understand his Polish, do you mean to say?

A. I did not understand because he does not pronounce correctly.

Q. Did you at any time during the examination say that you did not understand the interpreter?

A. I said to him, "I don't understand the way that you translate," and he said to me, "But I understand."

Q. When did you say that, in the beginning or the end, or at what time during the examination?

A. In the middle, towards the end.

Q. You heard these questions and answers that were just read to you translated by Mrs. Maier?

A. I understand everything that Mrs. Maier says.

Q. What was read to you as having been asked you and what you answered, was that right or wrong?

A. No, it is not all correct.

Q. What part of it is not correct?

A. I don't remember exactly what, but some of the expressions and some of the words are not what I said at all.

Q. Well, what part of it is not correct?

A. I cannot tell just exactly which part, but I do know that this is not what I said; this is not translated correctly, I did not say that.

Q. Well, I want to know now what part of that which has just been read to you is not correct. You know now what happened, do you not?

A. The part where it says that the engine hit me in the back is not correct because the engine hit me on the side here (indicating).

Mr. Robinson : The left side.

Mr. von Bernuth : Indicating the left side and arm, is that right?

53 Mr. Robinson : Yes.

A. (continued). Here it hit me (indicating).

Q. And is there anything else that is incorrect in what has been read to you out of these questions and answers?

A. I cannot remember just now.

Q. Well, you remember what was read to you, do you not?

A. I know what you were reading when you read it, but I do not remember exactly what it said in it.

Q. Well, now, we will have the questions and answers that I read you before translated to you again, and you tell me what part of the questions or answers are incorrect?

The Interpreter : Shall I read them one by one, and then he could say whether it is correct or not?

Mr. Robinson: I think that would be fairer to the witness.

Mr. von Bernuth: All right, do it that way. Counsel requests the interpreter to read the questions and answers to him one by one, and have the witness indicate whether or not those questions and answers are correct?

The Witness: The first question is correct.

Mr. von Bernuth: Will you read that question so that it will be in the record?

The Interpreter: The question is, "Why didn't you look to see if there was a train on that track on which you were hurt?" The answer is, "It was a foggy night, and when I went out I looked around and did not see anything, did not hear any bell or whistle and started to walk. The trains generally blow a whistle or ring a bell. This one did not do that."

54 Mr. von Bernuth: You said the witness said that is correct?

The Interpreter: That is correct.

Q. Now, will you read to the witness the next question and the next answer, and find out whether that is correct.

A. No, that is not correct.

Mr. von Bernuth: What is the question and the answer? Read it?

The Interpreter: "Did this engine hit you in the back?" The answer is, "Yes."

Q. That is not correct?

A. No, he says, "I told him that the engine hit me from the side of the back, here (indicating), and he put it down "the back."

Mr. Robinson: He puts his hand there on the left forearm, or upper arm, rather, near the shoulder.

Mr. von Bernuth: On the back side of it.

Mr. Robinson: Well, around towards the back.

Q. Now, read the next question and the next answer, and ask him whether that is correct?

A. That is not correct, I did not say that. The question is, "Did you look behind to see if any engine was coming?" The answer is, "No, when I started to walk I did not see anything, and it hit me and knocked me down and cut my leg off."

Q. You say that is not correct?

A. Yes, he says that is not correct, that he said he did look around.

Q. I want to get that on the record. You say that is not correct?

A. No, this is not correct.

Q. And do you say that you did not say, did not answer in reply to the question that was made to you as read?

A. No, I did not say it this way.

Q. Before you had this examination at your house, you
55 swore to tell the truth, did you not?

A. Yes, I was under oath.

Q. And you tried to give the best answers you could at that time?

A. Yes, I tried to tell the whole truth.

Q. And that was three months from the accident, whereas it is now more than a year?

A. I don't remember whether it was three months. I don't remember exactly how many months it was. Even as I am sitting now, I have noises in my head and my head just turns around. I have a very bad memory now, from the accident. My head hurts me, and I have noises in my head.

Q. Was your memory just as good when you had this examination as it is now, or was it better?

A. My memory is better now than it was at the time.

Q. Now, will you ask him the next question and the next answer, and have him say whether or not that is correct?

A. Yes, this is correct.

Q. Will you read the question and answer, so that it is in the record as admittedly correct?

A. Yes, sir.

The question is, "After you started to walk you did not look behind to see if an engine was coming, did you?" A. When I walked out of the engine room I looked around and did not see any train, and in about three minutes the train ran me down."

Q. That is correct, is it?

A. Yes, this is correct.

Q. Now, will you read the next question and the next answer, and have him say whether or not that is correct?

A. This is not correct, as I did not see any engine coming towards me at all.

Q. You say that your last question and answer which was read to you, that you did not so testify at the hearing?

A. No, I did not say so.

Mr. von Bernuth: Put the question and answer on the
56 record.

The Interpreter: "Q. After you left the engine room and started to walk, after that did you look behind you to see whether an engine was coming? A. When I walked out of the engine room I looked around down there, did not see any engine come, only I saw one come from the pit towards me, and I started to walk. I did not look around any more."

Mr. Robinson: And may it be noted that that is the question that he says is not correct?

Mr. von Bernuth: Yes, that is the question he says is not correct.

The Interpreter: Yes. Counsel, then he added something to it; he says it is not correct, because I did not see any coming towards me.

Q. And do you say that you did not make the answer which has been read to you?

A. No, this is not correct.

Q. Will you read the next question and answer to him? Read the question and answer in English first and then translate it to him and ask him whether or not it is correct?

The Interpreter: The question is: "So you did not look in back of you as you walked along the track?" A. No, then I did not look any more."

A. And this is not correct, either.

Q. What part of it is not correct?

A. The part where it says that I did not look behind or look in back of me, for I did look.

Q. And do you say that you were not asked and you did not make the reply which has been read to you?

A. No, this is not correct, and I told him that the engine pushed me ahead, and it does not say anything in this about it at all.

57 Q. At the time this accident happened, on January 25, 1917, were you living in Jersey City?

A. Yes.

Q. Are you a Russian Pole?

A. Yes.

Q. Do you remember being treated at the hospital by Dr. Mooney?

A. They said that there was some Dr. Mooney in the hospital, but I don't know whether that was the name of the doctor or not.

Q. Did you talk with the doctor that they said was Dr. Mooney?

A. No.

Q. Did you tell Dr. Mooney how the accident happened?

The Interpreter: The answer was, "No" before.

Mr. von Bernuth: Ask him again?

A. No.

Mr. Robinson: What is Dr. Mooney's full name, Mr. von Bernuth?

Mr. von Bernuth: John J.

Q. Did you tell Dr. Mooney that, "I took some ashes to the pit, and then went for a drink of water, and while coming back engine hit me?"

A. No.

Q. Did you not say that to him?

A. No.

Q. Is it not a fact?

A. I don't remember. I did not talk to the doctor anything; I did not say anything to the doctor.

Mr. von Bernuth: Mr. Lewicki and Mr. Young, will you please stand up?

(Two men in the court room stand up.)

Q. Do you recognize these two gentlemen here, one as being the interpreter, Mr. Lewicki, and the other, Mr. Young, the stenographer, who were present at your examination at your house last year, the examination from which we have read questions and answers?

A. I remember that there was an examination, but I do not remember what I said.

58 Q. Were those two men there, was one the interpreter and the other the stenographer at the hearing, yes or no?

A. I spoke to the interpreter.

The Interpreter: He says, "They were there, but I spoke to the interpreter."

Q. Is he the man with the glasses?

A. I do not recognize him.

Q. When you came out of the engine room, after you had got a drink, how far could you see?

A. You could not see anything, because the night was so foggy you could hardly see as far as this table (about six feet). The steam of the engines was near the ground, you could hardly see the ground, it was so foggy.

Q. Could you see the engine on the pit?

A. No.

Q. How did you know the engines were there?

A. When I got to the pit then I could see them there when I was standing at the pit.

Q. Did you see engines on the pit, on all the tracks?

A. When I got next to them, I could see them.

Q. And you saw engines standing on the pit, on all the tracks?

A. Only those that were standing on the ash pit when I got next to them.

Q. This place where you worked that night, while you were going to get a drink, were there trains moving backwards and forwards all the time?

A. Where I was working the trains, they were moving on this side and they were moving on this side (indicating).

Q. And when you went out there you knew that trains would be moving backwards and forwards along those tracks?

A. When I was working? When I came to work?

Q. When you went out there to dump those ashes into the ash pit, you knew that that was a place where engines and trains moved backwards and forwards all the time?

A. I knew as a rule that they were going here and there.

59 Q. That is known as part of the engine yard, that was, the part where you were in; the part that you were in was part of the engine yard?

A. Yes.

Q. And near it, to the north, were the main passenger tracks of the company, and siding tracks, where they moved passenger cars, backwards and forwards?

A. Yes, around are the rails, and in the center is the coal pocket and sand house. On one side there are trains and on the other side there are trains; on both sides they were working.

Q. That is, trains and engines both were moving backwards and forwards?

A. Yes.

Q. And they had been doing the same thing during the year and a half or three years that you were working there?

A. Yes.

JUSTIN KISHKEL, a witness called on behalf of the plaintiff, being duly sworn, testified as follows, through the interpreter, Mrs. Helen Maier:

Direct examination.

By Mr. Robinson:

Q. You work for the Erie Railroad now, do you not?

A. Yes, sir.

Q. Have you the job that Szary, the plaintiff, had at the time he was hurt?

A. Yes, I work in the place where Szary used to work.

Q. I say, you have his job; you are doing the very same thing that he was doing the night he was hurt, are you not?

A. I have now the same, only it is for the daytime.

Q. Well, but it is preparing this sand and feeding it into these engines that are used by the Erie Railroad?

A. Yes, it is the same work.

Q. You were working near the place where Szary lost his
60 leg, were you not, at the time that he lost it?

A. The coal pocket, not very far away.

Q. What was the first that you knew of his accident?

A. He was carrying a pail, and in a few moments I saw how they were pulling him off the tracks.

Q. Do you know what ran over him?

A. Afterwards, when I looked I saw.

Q. What was it?

A. I don't know exactly. They said it was an engine.

Q. Well, did you not see it?

A. No, I did not see it.

Q. You did see him lying on the tracks before he was lifted off or taken away, did you not?

A. I saw when a man was taking him off the tracks.

Q. Well, did you not hear some cry before that, before you saw him being taken from the tracks?

A. I heard a scream, and then when I went over to the place to see what happened, I saw they were pulling a man off the tracks, and when I looked it was Szary.

Q. The first thing you heard, then, that was unusual, was a scream of distress as though of somebody crying out in pain, is that not so?

A. Yes.

Q. And did you go to the place where that sound seemed to come from?

A. Yes, I went there, and in a few moments a group collected.

Q. Well, you went there just as soon as you heard the scream, did you not?

A. When I heard I went.

Q. And did you see Szary, the plaintiff, while he was still lying on the ground?

A. No, they were pulling him on the side, pulling him off on the side.

Q. Well, was he near the railway track at that time, when you first saw him?

A. He was already pulled across the rails.

Q. Did you hear any bell just before you heard this scream?

Mr. von Bernuth: I object to that as leading.

61 Objection overruled. Exception by defendant.

A. No.

Q. Did you hear any whistle, just before you heard that scream?

Mr. von Bernuth: Same objection.

Objection overruled.

Mr. von Bernuth: I object on the further ground that this witness testified he did not see the accident. It has no connection. He saw the plaintiff go off with a pail.

The Court: He was within hearing distance.

Mr. Robinson: He heard the scream of his voice; he heard his voice.

The Court: Whether he heard other noises, that is competent.

Exception for defendant.

A. No.

Q. Were there any stationary lights around the place where you saw Szary lying, when you went to him immediately after you heard his scream?

A. I could not see anything because the rain was falling heavily, and the steam was on the ground, and I could not see anything.

Q. How near did you get to him before you saw his body?

A. Afterwards I went right on the side of him.

Q. Well, do you mean by that you came right up close, brought your feet up to about where he lay?

A. He lay about twenty feet away from me.

Q. What?

A. He lay about twenty feet away from me, and then I went over to him.

Q. Well, I say, when you were first able to see him how near were you to him when you first saw that he was there?

A. Not so far away, but I could not see distinctly, he was all covered with mud.

62 Q. Well, can you tell us about, with your hands or by checking it off from where you sit, about how near you were to him before you could see him at all? Start from the wall and in-

dicating out this way. Ask him how far from the edge of the witness stand?

A. Twice the length of from here to the wall (indicating).

Mr. von Bernuth: Bring out your ruler, please. Would you mind measuring that, Mr. Robinson? I ask the Court that the distance may be measured. The witness says it was twice the distance from where he is sitting to the wall, that he could see the plaintiff. It is at least twelve feet, if this is twelve feet (indicating distance testified to by plaintiff), and twice that is twenty-five.

The Interpreter: He says now that he did not understand the question.

The Court: Well, will you explain it, then. Ask him again.

Mr. Robinson: You understand it, Mrs. Maier, don't you?

The Interpreter: Oh, indeed I do, certainly. You want to know the nearest that he was to the man when he was lying down on the ground.

Mr. von Bernuth: When he first saw him.

Mr. Robinson: Well, I will ask it again.

Q. How near did you get to Szary lying on the ground, before you could see him?

A. The first time, is it not, counsellor?

Q. The first time that he saw him, yes?

A. I don't know exactly; about ten feet.

Q. Did you see what was done with him at that time, after you saw him lying on the ground, within about ten feet?

A. They were binding up his leg.

63 Q. Well, how near were you to the tracks on or near which you saw him lying, when you first heard this scream?

A. As I said, about twenty feet.

Q. Before you heard this scream, did you hear any train go by?

A. No.

Q. What were you doing at the time? Or first I will ask you this, before you heard the scream did you see any train go by?

A. No, I did not see any train. When I heard his cry I went over and I saw that they had pulled him away from the track.

Q. What were you doing at the time you heard the scream?

A. I was working around coal, and then I was through, and I was just standing around.

Q. Well, you were out in the open air, were you not; you were not in any building?

A. Yes, I was outside.

Mr. Robinson: "No, I was not in any building," is that what he said?

The Interpreter: "No, I was not in any building, I was outside in the open."

Q. You are working for the Erie Railroad today, are you not?

A. Yes.

Cross-examination.

By Mr. von Bernuth:

Q. Are you a relation of the plaintiff in this action?

A. My grandfather and his grandmother are brother and sister.

Q. And you have known him for a long while, have you not?

A. Yes, I know him a long time.

Q. You know where the ash pits are, right near, in front of the coal pockets?

A. Yes, I know.

Q. Where they were in 1917, when this accident happened?

A. Yes.

Q. And at each end of the ash pits as they were in 1917, when your cousin was hurt, do you remember that there were electric lights away on the top of poles at each end of the pits?

A. I did not see any.

Q. Do you remember that there were lights at each end of the pit?

A. No, I do not remember.

Q. Your work did not take you out there at all, did it?

A. I did not work around there; I did not have to go around to the ash pits.

Q. So you never paid any attention to what the lighting was there, or the arrangement?

A. It was dark, and the rain was falling, so I could not see anything anyway.

Q. How near were you to the plaintiff when you first saw him after he was hurt?

A. I was about ten feet away from him.

Q. Could you see him plainly?

A. Yes, I saw him.

Q. And you could have seen him twenty feet away if you had been twenty feet away?

Mr. Robinson: I object to that as incompetent.

The Court: Yes, sustained.

A. No.

Mr. von Bernuth: Do you want to leave that stand, or do you want it out? I think it had better go out now.

Q. You said you did not see the engine go by, did you, before it hit Szary? You told Mr. Robinson that you did not see the engine go by that hit Szary?

A. No, I did not see any engine. Afterwards, when I went back to the ash pit, they told me that an engine had hit Szary.

Q. So you were not paying any attention to any bells or whistles on that engine or on any other engine, before you found out that your cousin was hurt?

A. I did not hear anything.

Q. You were not paying any attention to them, were you?

65 A. I did not try to listen to hear them, I did not hear them.

Q. What were you doing at that time, before you heard the scream?

A. Nothing. I just went over when I heard the noise, and I saw that it was Szary who was hurt.

Redirect examination.

By Mr. Robinson:

Q. You say that you were not doing any particular thing at the time you heard this scream, you were just standing there, is that right?

A. Yes, I was just standing outside. I was not doing anything.

Q. And do you remember in what direction you were facing, whether it was towards the track on which you afterwards found Mr. Szary?

A. I was just standing there and looking, that the rain was falling and the night was so very dark.

Q. What way were you facing at the time you heard this scream?

A. As I went out, I was standing at the end of the coal pocket.

Mr. Robinson: Is that the answer to that question?

The Interpreter: That is what he told me.

Q. Do you know what I mean when I ask you in what direction you were facing or looking when you heard this scream?

A. Szary was lying on the left side of me.

Q. When you heard the scream, at least when you started to go to the place where the scream seemed to come from, did you walk forward or to the side, or what way?

A. I don't remember. I just turned and ran towards where Szary was laying.

Q. Well, did you go forward?

A. On the left side.

66 Q. Was it a forward movement? In other words, with relation to the track on which you found Szary lying, what way were you facing before you heard the scream?

A. I turned around and I went over the tracks.

Q. Can you show us on this picture, Defendant's Exhibit A, where you were standing? Can you show us about the spot where you were standing, on that photograph?

A. I was standing here, but this was not there at the time (indicating on Defendant's Exhibit A).

Mr. von Bernuth: He means the fence.

A. This fence was not there at the time. I was standing right here (indicating).

Q. You were standing about where this fence is now, is that what you mean?

A. There was a little gate there. This fence was not there.

Q. Well, I am talking of the ground, the roadbed?

A. Right here (indicating).

Mr. Robinson: The witness indicates the point where that fence is now, and says that was not there.

Q. You were standing at about the point somewhere on the line of that fence, which was not there at the time of this accident, is that right?

A. Yes, in the yard here (indicating).

(Mr. Robinson marks the place "Place where Kiskhel was standing when he heard scream.")

Recross-examination.

By Mr. von Bernuth:

67 Q. When you say turned to your left and went to where you heard the scream, do you mean you walked towards the coal pockets?

A. No, I went over the track.

Q. Towards the ash pits?

A. Yes, sir; towards the ash pits.

Q. In the direction of the ash pits from where you were standing?

A. Yes.

Q. And you say that at that time, before you started to move, Szary was about ten feet away from you towards the ash pits?

A. I went about ten feet from there, and then I saw that they were binding his leg up.

Q. And that was towards the ash pits from where you were standing?

A. Yes, towards the ash pits, on that side.

Q. And how far was Szary away from you when you saw that his leg was being tied up?

A. About ten feet, not more.

Q. More towards the ash pits?

A. They pulled him off the tracks, and he was lying there.

Q. Nearer the ash pits?

A. On the corner of the coal pit, not far from the ash pits.

Q. It was nearer the ash pits than the coal pits than where you were standing where you saw him with his leg being bound up?

A. On one side is the ash pit, on the other side is the coal pocket.

Q. He was lying in that direction?

A. On that side of the track.

Q. On the side of the track but nearer the ash pits than where you were?

A. It was nearer the ash pits and on this side was the coal pockets (indicating).

Mr. Robinson: I am about to rest, your Honor, but as the adjournment time is near I would like to have the time to examine another witness that I may want to call tomorrow.

68 The Court: Do you want to take a recess now, is that satisfactory?

Mr. von Bernuth: Yes.

The Court: We will take a recess until tomorrow morning at ten-thirty.

Adjourned to Wednesday, May 15, 1918, at 10:30 A. M.

New York, May 15, 1918.

Mr. Robinson: In this case, your Honor, the plaintiff rests.

Mr. von Bernuth: I would like to ask the plaintiff a few more questions, if the Court please.

The Court: Very well, bring him back.

ANTONI SZARY recalled:

Cross-examination continued (through interpreter).

By Mr. von Bernuth:

Q. Szary, as you walked along after having gotten your drink, where did you walk, between the rails?

A. No.

Q. As you walked along were you listening for bells and whistles?

A. I was paying attention, but there weren't any bells or whistles.

Q. Were engines running backwards and forwards all the time, so that you might expect that an engine would move on any track at any time?

Mr. Robinson: I will object to that. The question is involved.

The Court: It is objectionable in that form.

69 Q. Well, were engines running backwards and forwards all the time, in the engine yard, near where you were hurt?

A. I did not see any engine.

Q. Was it a place where engines were backing and going forward more or less all the time?

A. I did not see any engine moving around at all, and I was hurrying back to get my pail, and I did not hear anything.

Q. Was not the track next to which you were walking, or on which you were walking, a track on which engines were moving more or less all the time, to get coal and water?

A. I did not hear anything. There weren't any engines running around.

Q. Was it not a track on which engines got coal and water more or less all the time?

Mr. Robinson: Well, now, wait a moment. Suspend this just a moment.

A. That track is one where engines are running around, but at that time no engine was moving around there at all.

Q. I show you Defendant's Exhibit A, the photograph, and ask you whether you remember a telegraph pole such as I am showing you on the photograph, with arc lights, being near the ash pits at the time you were hurt?

A. There was no light there; there was nothing there.

Q. At the time that you were hurt, during that time and before that, were there not telegraph poles with electric lights there, whether lighted or no?

A. I did not see anything. The night was very dark, I could not distinguish anything.

Q. Well, was there not a telegraph pole there with an electric light at the top of it? I am not asking you whether the light was lighted, but was there not a telegraph pole with an electric light there?

A. I do not remember anything, as the night was very dark
70 and I could not distinguish anything. I was hurrying to get my pail, I did not see anything.

Q. Do you remember some of the nights before the night you were hurt, seeing the telegraph pole with an electric light on the top of it near the ash pit?

A. I do not remember about this.

Q. I am now asking you whether you remember, before the accident, whether on clear nights you saw a telegraph pole with an electric light on it near the ash pits?

A. I do not remember, as I was paying attention to my work. In fact, I was working in the sand house; I never noticed any.

Q. As you were walking before the accident happened, could you see where you were going?

A. I could not see anything, as the steam from the engines was so thick that I could not even see hardly anything under foot.

Q. Where were the engines from which the steam was coming?

A. The engines were all around through the yard; the engines come from far away.

Q. And what were the engines doing?

A. The engines go there the whole night; they bring coal and everything.

Q. Where were the engines?

A. They go to Chicago and to Philadelphia and all around, different points.

Q. No, where were the engines in the yard?

A. I could not see where the engines were standing at the time, as steam and smoke were so thick I could not see any engines.

Q. Did you hear any engines?

A. I could not hear any engines at all; I could only see the steam.

Mr. von Bernuth: That is all.

Plaintiff rests.

71 Mr. von Bernuth: I move to dismiss the complaint on each and all of the following grounds:

First. The plaintiff has failed to prove a cause of action against the defendant.

Second. The plaintiff has failed to prove the cause of action alleged in the complaint.

Third. The accident happened solely because of the contributory negligence of the plaintiff.

Fourth. The accident happened as the result of one of the risks of the plaintiff's employment which were assumed by him.

Fifth. The plaintiff was not engaged in interstate commerce of the defendant within the meaning of the Federal Employers' Liability Act.

Sixth. This Court has no jurisdiction of the action, under the proclamation of the President with respect to railroads dated December 26, 1917, and the orders of the Director-General of Railroads No. 18 and 18-A made pursuant to said proclamation.

The Court: This is the case in which Judge Knox decided the Court had jurisdiction.

Mr. von Bernuth: Yes, sir; but it ought to appear on the record here.

Mr. Robinson: Let it appear, then, on the record that that matter has already been presented to Judge Knox and he has ruled against the defendant, holding that the case is properly here and denied the motion to dismiss.

Mr. von Bernuth: I renew the motion, if your Honor please, with respect to that particular ground. I certainly press the motion with respect to other grounds that I have mentioned.

72 The Court: I think I will have to follow Judge Knox's ruling in this District Court.

Mr. Cannon: Of course, the point here, if your Honor please—there is no appeal from the order of Judge Knox, but we might as well have it on the record here.

The Court: Is that all?

Mr. von Bernuth: That is all the grounds of the motion. I think probably Mr. Cannon would like to argue the points of law involved.

The Court: Very well.

Mr. Cannon: It seems to me that the proof is that this man was engaged in returning from getting a drink of water.

Mr. Robinson: Mr. Cannon, I cannot hear when your back is toward me. You talk so low. Either get behind me, or talk a little louder.

Mr. Cannon (continuing): Getting a drink of water for himself, was returning to the ash pit to get a pail which had been used for the purpose of dumping ashes from this sand stove, and he was hurt while on his way to get the pail.

It appears here perfectly clearly that this is a railroad which is engaged in both interstate and intrastate commerce, and that the work in this yard is of a miscellaneous character, which is spoken of frequently in the decisions of the Supreme Court. The presumption is, of course, in the absence of any proof bringing plaintiff within the act, that the plaintiff was not engaged in interstate commerce, that he was engaged in intrastate commerce. He has to bring himself within special legislation.

73 The Court: I do not think there is any presumption about it, but there is a burden of proof on him to establish the fact.

Mr. Cannon: Well, it is a matter, I think, of phraseology, whether you apply the principle of presumption or whether you apply—

The Court: I think he must establish his case and one of the elements of his case is to establish by a fair preponderance of evidence, that he was engaged in interstate commerce.

Mr. Cannon: Yes, he has to establish facts bringing himself within special legislation.

Now, this sand was dumped in a pile, taken from the pile and put in the stove for drying purposes, then sifted, and then put into a sand box or bin, and from the bin put into the engine. Szary was engaged, he had finished his work of taking out ashes from the sand stove which dried the sand which was put in a bin from which it was put into the engines.

I do not see how this case is to be distinguished, it seems even more remote than in the Harrington case, or the Barrow case. In the Harrington case the man was engaged in carrying coal, that is his train was, which had been brought from without the State. It might then have been held to be interstate commerce, but it had been brought from without the State and was being carried to the bins, and he was hurt, he was held not engaged in interstate commerce, although the coal from the bins was placed in engines engaged in interstate and intrastate hauling.

In the Barlow case we have the same sort of thing.

The Court: The Barlow case is distinguishable from this. There the coal was brought from Pennsylvania to New York State, 74 was placed on a siding and was kept there for some seventeen days. Then a switch engine came and took that coal and brought it up to the hoppers of the railroad company, where the coal was going to be used.

Mr. Cannon: Yes, that is like our case. Supposing that Mr. Szary was engaged in taking the sand and throwing it into the pile or into the bin, it would be just like the Barlow case exactly.

The Court: I do not think so. You see, this sand that he was preparing, of course, it all makes up the proposition of preparing sand for locomotives. Now, he was engaged in a measure, in the preparing of this sand. He was engaged in taking away the ashes from the stove which heated the sand, where they sifted it, and that was part of the so-called manufacture or preparation of the sand for use in the engines; and that sand, the evidence is, was used indiscriminately for interstate and intrastate commerce.

Mr. Cannon: So in the Harrington case, the coal was used indiscriminately and was being thrown into the bin, was taken from the train and put into the bin, and the plaintiff was engaged in hauling it to the bins, so we would have the same case here—

The Court: But you see, it might have been a different case, in the Harrington or in the Barlow case, if the man was actually engaged in shoveling coal after it got to the hopper. Suppose he was engaged in shoveling coal at the hopper, after having been taken

75 from the switch to the hopper? If he was engaged in loading coal or putting it into another bin, or mixing coal, something where the coal was then to be taken from there to engines engaged in interstate and intrastate commerce? Now, I think in that case they would have held that he was engaged in interstate commerce.

Mr. Cannon: I should hardly think so.

The Court: Well, that is the reason that Judge Westenhaver in that Water case——

Mr. Cannon: That, of course, is perfectly distinguishable, because first it was a motion to remand, without a trial.

The Court: No, he had to pass upon that very question, whether it was interstate commerce.

Mr. Cannon: Yes, but it was on a motion to remand back, without a trial.

The Court: He was obliged to decide the question of whether this was interstate commerce.

Mr. Cannon: Entirely upon the complaint, and not upon any proof. Entirely upon the allegations of the complaint.

The Court: No, but he says there plainly that if this water which was in the water tank was used for engines engaged in interstate and intrastate commerce indiscriminately, he said then the ruling would be that he was engaged in interstate commerce.

Mr. Cannon: Well, he puts it clearly on the ground, at the top of about the third page of the opinion, that this was an inspection of an instrumentality of interstate commerce. He puts it on that ground, that the man was going down to inspect water levels, and he was

76 injured or drowned, or something, when he was doing that. He puts it on the ground that he was inspecting a fixed instrumentality, as Peterson was in fastening up the bolt in the rail.

The Court: But if this man was engaged in the work of preparing sand, he was preparing something which was an instrumentality of interstate commerce, just like the water.

Mr. Cannon: I do not see how you distinguish coal from sand.

The Court: I say, I think that if in the Barlow case the man, when injured, was engaged in the hopper in shoveling coal, or changing coal, if you please, from one hopper to the other, and that coal was used indiscriminately for interstate and intrastate commerce, then the Court would have held that he was engaged in interstate commerce. But you see the work he was doing in the Barlow case was, that the coal had finished its interstate shipment, it had arrived at the switch, the switch of the railroad company, and then a yard locomotive came in and took the coal and brought it up to the hopper of the railroad company. Now, while he was engaged on that part of the work they held that that was intrastate work, not interstate.

Mr. Cannon: Yes, because he was carrying coal to the hoppers, which was going to be put in the bins, and that was the Harrington case. He was carrying it to the bins. They speak of storage of coal; that is what he was doing, taking coal to the storage.

The Court: He was not doing anything to prepare coal for shipment.

Mr. Cannon: Then you have the Yurkonis case, where the man was digging the coal; he dug the coal.

77 The Court: That is digging, I think that is clearly different. There the man was a miner in the mine.

Mr. Cannon: But the Barlow case, and those cases, have clearly stated that where the man is not engaged in something at the particular moment to promote an interstate operation——

The Court: I think the strongest case you have is this case in the Appellate Division.

Mr. Cannon: Of course, that Gilbert case is stronger than our case. That Appellate Division case goes beyond the Szary case.

The Court: I think, in view of the ruling of Judge Westenhaver, I will follow that. I think this is the very nearest to that case of any of them.

Mr. Cannon: But, of course, I say there are two things about it. It is a preliminary motion, to decide upon facts stated in a petition on complaint.

The Court: Yes.

Mr. Cannon: Secondly, he puts it upon the ground and so states——

The Court: I know, but he was obliged squarely to determine whether it was interstate commerce.

Mr. Cannon: Yes, sir, he was, but upon the petition, the allegations in the complaint, and he puts it upon the further ground that he was engaged in inspecting an instrumentality.

You take the tunnel case, the man was building a tunnel, he was not engaged in interstate commerce. There has been a swinging of the pendulum, as your Honor knows, in the Supreme Court.

78 The Court: Yes.

Mr. Cannon: From applying the Act to certain circumstances, and now they are not applying it, and it is so stated in one of their decisions. Whatever the rule might have been, they said, when the case was tried, under a recent decision of this court there can be no question but what the man was not engaged in interstate commerce, because it is too remote. Going for the empty pail which had had ashes in it is further removed than the coal. It is like the house that Jack built; he was going for a pail which had removed ashes from coal or wood used to heat sand which was to be put into engines. It is about as remote as you can have it.

The Court: They held in this case, I think it was the Boyd case, where the mail clerk in the railroad yard was going to get his meal; there is a case where a fireman was returning to his engine for his day's work; and they held that on that mission, if he was about to begin work in interstate commerce, that he was then engaged in interstate commerce.

Mr. Cannon: Your Honor is familiar with the case of the Erie against Welch; that is in the advance sheets still, where the fellow had finished an interstate trip in the yard, got off to get orders, and but for the accident which occurred to him he would have engaged

in other interstate operations, and they said he was not engaged in interstate commerce.

The Court: The Supreme Court held in the Boyd case, I think, where the fireman was returning, about to take up his day's work—

Mr. Cannon: Yes, those were on the theory, and the Winfield case the same thing—

79 The Court: Yes, the Winfield case.

Mr. Cannon: On the theory that where a man has dual work during the day of interstate and intrastate nature, so that the whole day is characterized by interstate operations, when he goes to his work, or comes from it he is engaged in interstate commerce. But it distinctly held that during the day, if he is engaged in one operation and then another, you have got to differentiate and divide and find out what operation he was engaged in at that particular moment.

The Court: I had a case that was tried and decided recently where a colored man was working on the docks, shifting freight, both interstate and intrastate freight, and at 12 o'clock every night he was permitted to go over to the shack that they provided in the rail-road yards, to get his midnight meal, and this night he went out of the yard and went up to a hotel over in New Jersey, to get his meal; he said the cooking did not suit him at the shack. In returning he was injured and they held there it was interstate commerce.

Mr. Cannon: That is like the Steel case, where his interstate work was interrupted and he was getting off somewhere and did not come back. It strikes me that this case is more removed than the Barlow or the Harrington case.

Mr. von Bernuth: There is one suggestion here that has not been pressed, and that is this: This sand which was being dried was taken from storage, it had been taken from a dump in a pile right next to the sand house; that is the evidence. It had been put in a pile there,

from which it was subsequently taken, which is in storage.
80

The Court: What is that case I tried against you?

Mr. Cannon: Yes, that was a case where they got a verdict.

The Court: Where they held that it was interstate commerce where parts of an engine were being dumped into a vat for cleaning.

Mr. Cannon: That was interstate commerce, and that was before the Harrington case. I argued that case before Judge Hough in the Court of Appeals about two weeks ago, and Judge Hough said he was in that case, and if he decided now he would decide differently.

Mr. Robinson: I do not think we can take that for authority for amending the ruling.

Mr. Cannon: It would have been decided differently, and it would have to be.

Mr. Robinson: The Peterson case, the principle laid down in the Peterson case, I think, is applicable here. There a man was carrying a bag of nails.

Mr. Cannon: Bolts.

Mr. Robinson: Bolts, or something to be hammered into a bridge that carried both interstate and intrastate commerce, and there it

was held by the Supreme Court of Washington that the general occupation of the man is clearly within the construction of this Act.

The Court: I think I will follow Judge Westenhaver and deny the motion. The other points are for the jury, negligence, and so on. I will deny the motion.

Mr. von Bernuth: I take an exception on each and all of the grounds.

81 THOMAS F. WEBB, recalled by the defendant:

Direct examination.

By Mr. von Bernuth:

Q. Mr. Webb, was the general arrangement of the coal pockets, the engine room and the sand house, the ash pits and the tracks which have been shown on that picture, Defendant's Exhibit A, the same in 1917, when this accident happened, as they are in that picture (handing witness Exhibit A)?

A. Yes, sir.

Q. And at that time were there or were there not electric lights at each end of the ash pits that are shown on that photograph?

A. Yes, sir.

Q. And describe those electric lights, please?

A. Well, there is one at the west and one at the east end of the ash pits. There is an electric light at the turntable, at the lever of the turntable.

Q. Which is to the left of the photograph?

A. Yes, sir. You see, your Honor, there is one light there; the other one is on this pole here above, you see; that is at the west end of the pit, and this is right over here (indicating on photograph).

The Court: One to the east, and what?

The Witness: One right at the east, and one right at the west end of the ash pit.

Q. Will you mark those two lights with an "L," each of them with an "L"? (Witness marks.)

Mr. von Bernuth: I will mark them, if you will let me.

The Witness: Yes, if you will mark them.

Mr. Robinson: All right.

Mr. von Bernuth: I will put an "L" right here. Where is the other one?

The Witness: Right up here on the post here, just the other side of the pole (indicating).

82 Mr. Robinson: There is none on that pole which has just been marked.

Mr. von Bernuth: I will show it to you on another photograph, in just a minute. I will testify to it myself if you want me to.

Mr. Robinson: It is so small it does not show on the photograph.

Mr. von Bernuth: We will take it on the other side.

Q. This sand which was kept in storage between the coal pockets

and the sand house, as shown on this picture, was put in that place when?

A. On a Sunday morning.

Q. Once a week?

A. Every week, every Sunday morning.

Q. And how was it put in there?

A. Put in by, brought in in cars, and a Browning hoist takes it and lifts it from the cars into the bin.

Q. It is dumped in there by means of a shovel?

A. They have a big shovel, a steam shovel.

Q. And the sand remained there all the week long?

A. Yes, sir.

Q. And is that the pile from which the sand was taken (indicating on photograph)?

Mr. Robinson: That is not sand there, is it?

The Witness: Yes, sir, that is there.

Mr. Robinson: The sand was there and used from day to day?

Mr. von Bernuth: I am going to ask him that.

Mr. Robinson: Then it is misleading and I object to that. It is leading, anyhow, and I object. I suggest it is leading, I think.

The Court: Do not lead him. Go ahead.

S3 Q. What happens to that sand that is put on that pile?

A. They daily dry it and use it on the engines.

Q. It was taken from the pile and put in the stoves?

A. Yes, sir.

Q. And from the stoves the dry sand was placed where?

A. The dry sand was placed in that bin, that has got a cover on it there.

Q. Which is in a little house to the left of the sand house?

A. Yes, sir.

Q. And was in 1917, when this accident happened?

A. Yes, sir.

Q. And the dry sand was later taken from this sand storage where the dry sand was, and placed in the engines?

A. Yes, sir, the sand boxes.

Q. I show you another photograph and ask you whether that is a representation of the situation as it existed in January, 1917, at the time of this accident?

A. Yes, sir.

Q. That picture is taken, looking from northwest toward the coal pockets?

A. Yes, sir.

Mr. von Bernuth: I offer it in evidence.

Marked Defendant's Exhibit B.

Q. The round structure to the right of the picture is the water tank?

A. Yes, sir, a water tank.

Q. And the large structure with a high roof, is what?

A. Coal pocket.

Q. And where is the engine room located with respect to the coal pocket and the water tank?

A. Right in here (indicating on the photograph).

Q. You are indicating in between the water tank and the coal pockets?

A. Yes, the engine room, gas engine room.

Q. Which end of the coal pockets are we looking at?

A. You are looking at the west end now.

Q. And where is the sand house with respect to the west end?

A. The sand house is on the east end.

84 Q. Hidden behind the east end of the coal pockets as they appear in this picture?

A. Yes, sir.

Q. And it is to the left of the coal pockets as they appear in this picture (indicating)?

A. Yes, sir.

Q. Does this picture also show the two telegraph poles with the lights on them, on the ash pits?

A. Yes, sir.

By the Court:

Q. How far are those poles from the sand house?

A. Well, the poles from the sand house, I should judge, are seventy feet, the nearest light.

Q. What kind of a light is it?

A. It is an arc light, a big arc light, drop light.

By Mr. von Bernuth:

Q. Do you know whether or not those two lights that are shown on the photographs, Defendant's Exhibits A and B, were lighted at the time Szary was hurt?

A. Yes, sir, those lights were lighted.

Q. During that evening, and at the time and before the accident, did you have occasion to pass by the place where those lights were more than once?

A. That light is reported to me every night, on account of the water, the hot water in those pits; those pits are where the ashes are dumped in, and the water is always red hot, and it is necessary for those lights to be lighted for fear that some man would fall in there and burn up.

Q. Did you pass by those places where those lights were that night?

A. Yes, sir, many times.

Q. Before the accident?

A. Yes, sir.

Q. And you passed by just after or at the time the accident happened?

A. I passed them when I found this man.

85 Q. I show you another photograph and ask you whether that also is a fair representation of the place, shown as it existed in January, 1917, at the time of the accident?

A. Yes, sir, that is a good photograph.

Mr. von Bernuth: I offer this in evidence.

Marked Defendant's Exhibit C.

Q. This photograph that has been marked Defendant's Exhibit C shows an engine standing on a track, does it not?

A. Yes, sir.

Q. And is that the track which is known as the coal pocket track?

A. Yes, sir.

Q. And is the one immediately next to the coal pocket, running between the engine room that has been spoken of by Szary as the sand house?

A. Yes, sir.

Q. And that is the track on which Szary was hit?

A. That is the track.

Q. Does that picture show a locomotive standing on that track?

A. Yes, sir.

Q. And what kind of a locomotive——

Mr. Robinson: One moment, please. I understand that this gentleman did not see the accident and did not see Szary until long after the accident. Am I right about that, Mr. Webb?

Mr. von Bernuth: He was the first man to pick him up.

Mr. Robinson: Maybe I am mistaken about that. Is that right?

The Witness: I picked Mr. Szary up after the accident. I found him.

Mr. Robinson: Oh, I beg your pardon, I did not understand that.

Q. What kind of a locomotive is that?

A. That is a switch engine, what is known as a bobtail.

86 Q. And is that the kind of tank that all switch engines had in January, 1917?

A. Yes, sir.

Q. And a tank is also known, in ordinary terms, as a tender, is it not?

A. Yes, sir. We call it a tank because it carries water.

Q. And on this tank are located what?

A. The headlight on the rear of the tank, and steps on the back for the brakeman.

Q. And are there steps on the front end of the engine, which you cannot see on that picture.

A. Yes, sir, there are steps on the front end.

Q. The same as on the back?

A. Yes, sir.

Q. And that is the way all switch engines were built in January, 1917?

A. Yes, sir, they are built that way today yet.

Q. Did engine 104 have the same kind of a tank?

A. Yes, sir.

Q. And the same kind of a headlight on the tank?

A. Yes, sir.

Q. Can you pick out on that picture, Defendant's Exhibit C, about the point where you found Szary?

A. Do you want me to mark it?

Q. I want you to mark it with an "X"?

(Witness marks photograph.)

Q. Can you also pick out this place on this photograph Defendant's Exhibit B?

A. What do you mean?

Q. The same place where Szary was hurt?

A. Mark that, too?

Q. Mark that one there, where you found Szary, I mean?

(Witness marks Exhibit B.)

Q. Just before the accident happened where were you?

A. Do you want me to give you full details?

Q. I want to know where you were before the accident happened?

A. I left the office and walked up to the water tank, the water tub.

87 Q. Just at the west end of the coal pockets?

A. The west end of the coal pockets. Engine 104 stood at the tub taking water, and I told the engineer to get on the engine and get down out of the way of a Hackensack engine known as Train 635. At that time this train 635 left Jersey City at 8:59 P. M., and this engine was due to go on there. I walked up and told the engineer to back on down out of the way, and go up over the ash pit.

Q. That is, you wanted him to come back down on the coal pocket track, to go up east of the sand house?

A. Yes, sir, and then cross over the ash pit, and get out of the way of the road engine. And he came down, then I walked down.

Q. Do you know what the engineer did with respect to the bell or the whistle of his engine?

A. The bell was ringing when he left the tub.

Q. Do you know whether or not he whistled?

A. Well, it is not customary to blow whistles around the engine yard in that territory, but is necessary for the bell to be ringing when the engine starts, and his bell was ringing.

Q. At this time the engine was at the west end of the coal pockets?

A. Yes, sir.

Q. Then what did you do?

A. I walked down, the bobtail backed down, Engine 104 backed down below the switch leading over to the ash pit. I walked on down, and on my way down I heard—

Q. One minute. How did you walk down from the water crane, toward where the engine had gone?

A. I walked down between the ash pit and the lead, the coal pocket lead—

Q. That is, between the tracks immediately north of the coal pockets and the first ash pit track?

A. Yes, sir.

Q. Is that all ground?

88 A. That is all ground, about fifteen feet there. I walked down, and I heard some one groaning; and I looked around and I couldn't see nobody. I walked back a little, down a little further, and I found this man here laying on the track.

Q. Where was he in respect to this track which is next to the coal pockets?

A. He was laying between the two rails, in between the two ties, in between the rails, with his leg over the rail.

Q. And opposite where you have marked the letter——

Mr. Robinson: No, let him tell.

Q. And where, with respect to the letter "X" that you have marked on Defendant's Exhibits B and C?

A. About right where I have marked it, and I carried him over in here between these tracks (indicating) and laid him there until I got the ambulance.

Q. This "X" is made outside of the rails. Where did you find him?

A. Right in ahead of this switch engine, in between these rails here (indicating).

Q. In between the rails?

A. Yes, sir.

Q. Do you remember any other people coming up there after the accident happened?

A. Yes, sir, hostler Tierson.

Q. Anybody else?

A. Oh, there were a number there. There was the engineer on the Hackensack engine, and engineer Bratton; the conductor on the switch engine came out and him and I lifted him off the rail. He helped me to lift him off.

Q. Who is that, Hammell?

A. Yes, sir.

Q. Where was engine 104 at the time you picked up this man?

A. Laying at the east end of the switch that goes over the pit.

Q. And where is that with respect to the sand house?

A. That is east of the sand house.

Q. And about how far from where you found the man?

A. About sixty feet.

89 Q. To the east?

A. East of him.

Q. And toward the river?

A. Yes, sir.

Q. The places you have marked "X" on photographs Defendant's Exhibits B and C are where, with respect to the east end of the coal pockets?

A. Yes, sir, that is where I marked the "X" in the east end of the coal pockets.

Q. About there?

A. Yes, sir.

Cross-examination.

By Mr. Robinson :

Q. What is your position there now, Mr. Webb?

A. I am the engine dispatcher.

Q. The engine inspector?

A. Engine dispatcher.

Q. Dispatcher. And were you that the night of this accident?

A. Yes, sir.

Q. And had been for a long time before that night?

A. Yes, sir.

Q. Did your work of engine dispatcher bring you in contact daily with this Szary?

A. Yes, sir.

Q. I mean by that, did you have the ordering of him, the regulation of his work?

A. I have the ordering of everybody in that yard, after 6 P. M., at night, until morning.

Q. And the train dispatcher had charge of this sand house, is that right?

A. No, sir, the train dispatcher had nothing to do with the sand house; the engine dispatcher has the doing of the sand house after six o'clock at night.

Q. You are the engine dispatcher; there is a difference between engine dispatcher and train dispatcher?

A. Oh, yes, sir.

Q. Well, now, Mr. Webb, is it not a fact that practically all the freight that comes into the Jersey City yards is carried on over the New York side of the river?

A. No, there is different kinds of freight. There is local freight, through freight and everything; but we have nothing to do with that, you know.

90 Q. But I mean you would call even local freight, freight that came from Jersey City and New York City, would you not?

A. Well, of course, the cars that come from the west are floated on.

Q. I cannot hear you?

A. I say the cars that come from the west are floated on floats from New Jersey.

Q. I am not talking about how it is done. I say that the freight, practically all the freight that comes in to the Jersey City yards, where this accident happened, is carried to some part of New York State, is it not?

A. Well, I could not say that, because——

Q. Don't you know?

A. I am not the yard master.

Q. But you have worked there for many years, and you have seen what was done, going on before you every day, have you not?

A. Oh, I have seen cars coming and going from and to New York.

Q. Don't you know that that is true, or substantially true, that practically all the freight that comes into the Jersey City yard is sent on to some point in New York State?

A. No, I don't know that. I could not say that. I could not say where it is shipped to, because I am not in contact with that business.

Q. I am not asking you that. I am asking you if it is not sent on either across the Hudson River or to somewhere in New York State?

A. Well, I could not say that, because, you see I have charge of the engines. I have got nothing to do with the freight yard.

Q. No, but you know a thing or two besides engines, don't you?

A. Oh, a couple of things.

Q. Besides what you know about engines. Is that not so, Mr. Webb, has not your experience there taught you that, in that yard?

A. About——

Q. Is that freight yard there simply a halting place for the freight that is on its way to somewhere else?

A. Why, yes, the cars are all there, of course——

Q. And that is true——

91 Mr. von Bernuth: Let him finish the answer, please. The witness did not finish the answer. I ask that the witness be allowed to finish the answer.

Mr. Robinson: All right, go ahead.

The Court: Anything else?

Mr. Robinson: I heard him say, "Yes"; that is all I wanted to know. What else did you say?

The Witness: I said the cars are there, I did not know where they were going to.

Q. Well, now, that compels me to ask the question again. I am talking about freight, not cars, not freight cars. Is it not a fact that all the freight that comes into the Jersey City yard where this accident happened, is kept there just temporarily and then transferred to New York?

A. Well, it is transferred to different points, all over, of course.

Q. In New York State?

A. Well, I could not say that.

Q. Is there any of it that goes back into Jersey again?

A. Some of it.

Q. Very little?

A. Some goes into Jersey and some goes into New York.

Q. What?

A. I say, some goes into New Jersey and some into New York.

Q. Why, is not that freight yard practically only a halting place for eastbound freight? I am talking about eastbound freight now?

A. I don't know anything about the freight yard. I haven't got nothing to do with it.

Q. You work in it, don't you?

A. How is that?

Q. Don't you work in it?

A. No, sir. I am the engine dispatcher. I have charge of the engines, engineers, firemen, hostlers, cleaners, pumpers, oilers, and so on; not the freight yard.

92 Q. Are not the engines you inspect, engines used in the freight yard?

A. I don't inspect no engines.

Q. Or dispatch, rather?

A. I dispatch engines.

Q. Is not your work in the freight yard, whatever it is?

A. No, sir.

Q. Where is it?

A. It is in the engine yard.

Q. Do not the engines move around the freight yard?

A. Why, the engines move all around the freight yard, but not under my jurisdiction. Those switch engines, when they leave my territory I am done with them.

Q. Have you ever been in the freight yard over there?

A. Oh, I have been over there; I never worked there.

Q. Aren't you in it every day?

A. No, sir, never.

Q. Well, the ferryboats are running between Jersey City and New York all the time for the Erie Railroad, aren't they?

A. Yes, sir.

Q. And a great deal of freight is taken over on the ferryboats, isn't it?

A. Oh, yes.

Q. And a great deal upon specially built lighters to carry cars?

A. Yes, sir.

Q. And the traffic is very active between New York City and Jersey all the time, isn't it, both as to freight and passengers; is that right?

A. Yes, sir.

Q. This sand that Szary helped prepare was brought and stored in the yard some place before it came up to him, was it not?

A. Well, it was brought in the yard and stored there, stored in the freight yard. They have a freight yard master for that kind of business, to look after the freight yard, and there is a passenger yard master to look after the passenger yard; but the engine dispatcher has got a different department.

Q. That is not what I asked you. Wait a moment. This sand that was finally brought to the sand house for Szary to help
93 prepare was brought into the yard in bulk, wasn't it?

A. In cars, yes, sir.

Q. And in some way or other it was passed along to Szary and the men in the sand house to work upon it?

A. It was shoved in there by the——

Q. Is that so, or not?

A. It is so, yes, sir.

Q. Then say "Yes," please, when you can?

A. Yes.

Q. "Yes" is the answer to that, is it?

A. Yes.

Q. Now, how many men were there in this sand house that aided in preparing this sand, in getting it in its final shape, when it was ready to be placed in the engines?

A. I don't get your question.

Q. How many men were engaged in the sand house in getting this sand in final shape so that it would be ready to place in engines?

A. There were three men.

Q. Who were they?

A. Well, there was Szary and two other Polaks.

Q. You don't remember their names?

A. Well, I don't know their names, to tell you the truth.

Q. Well, their work anyhow was the final work on the sand, wasn't it?

A. Yes, sir.

Q. And it was not only a part of their duty to get this sand into proper shape, but to put it in the engines, wasn't it; part of their duty, I say?

A. They had nothing to do with handling the sand, you know.

Q. I did not ask you a word about that. Are you trying to avoid answering the plain questions I ask you?

A. No, sir, I am here to answer your questions.

Q. Well, now, listen. It was not only a part of the work of Szary and these other Polaks, as you have described them, to get this sand in final shape for placing in the engines, but it was part of their work to actually place it in the engines, was it not?

A. Yes, sir, they had to—

94 Q. Now, the answer to that is "Yes," isn't it?

A. Yes, sir.

Q. Why do you want to tell me any more than I ask, if you know it?

A. I am not telling you any more. I am just answering your questions.

Q. The answer to that is "Yes," isn't it?

A. Yes.

Q. And that was something they were doing daily and nightly, was it not?

A. Yes, sir.

Q. Carrying the prepared sand, after they had finished the preparation, out and placing it in the engines?

A. Yes, sir.

Q. And that was part of the work that they were doing on the very night of this accident?

A. Yes, sir, that is what they are supposed to do.

Q. Yes. Now, of course, in order to do that work, the work of carrying it from the sand house to the engines, it was necessary for these men to be constantly crossing the different tracks in the yard, was it not?

A. No, sir.

Q. Well, sometimes, was it not?

A. It is not necessary for no man that is sanding engines to leave the sand bin.

Q. Not necessary for them to go away from the sand house at all?

A. No, sir.

Q. Well, sometimes, was it not?

A. It is not necessary for no man that is sanding engines to leave the sand bin.

Q. Not necessary for them to go away from the sand house at all?

A. No, sir.

Q. Well, now, what did make it necessary for him to leave the sand house from time to time?

A. Well, if he had ashes to dump out of the stoves or something like that, he may have to go out.

Q. Why "he may have to." He would have to, there is no "may" about it, is there?

A. Well, then he would have to.

95 Q. Yes, that is it, and, of course, taking the ashes out of the stove was something that these men were doing all the time, was it not?

A. Yes, sir, they had to take care of the fires.

Q. And when they did that, at least, they were obliged to cross certain tracks in this yard, were they not?

A. One track.

Q. Well, only one?

A. One track; that is two rails.

Q. Yes. And that is the very track that this man lost his leg on, is it not?

A. Yes, sir.

Q. The track that he was obliged to cross to carry the ashes from the sand house to the ash pit, is that right?

A. That is the way they always go with the ashes.

Q. Is that not the very track that he was run down on?

A. Yes, sir.

Q. The track that he was obliged to cross to go from the sand house to the pit?

A. That was the track.

Q. The answer to that is plain "Yes," is it not?

A. Yes.

Q. What protection was there around that yard for the men whose duties would compel them to cross this track on which Szary was run down?

A. What protection?

Q. What protection have those men? You know what I mean by that, don't you?

A. Yes. There are three of them working together; one of them should watch out while the other fellow goes out with the ashes.

Q. Is that the only protection they have?

A. That is the only protection any railroad man has got, to look out for himself while he is around the railroad yards.

Q. No other railroad man looks out for any other railroad man, does he?

96 A. I have to look out for myself. I have to cross thousands of them every day.

Q. You don't really mean that, Webb, do you, that some man should watch while another man crosses the tracks?

A. No, I didn't really mean it.

Q. Then why did you say it?

A. You say what protection did he have?

Q. Yes, and you said the only protection he would have would be to have other men watch out for him?

A. Yes, sir, that is what I mean.

Q. Well, now, do you mean that? Do you stand by that?

A. If he wanted protection, yes, sir.

Q. Well, he surely does want all he can get, doesn't he?

A. He does, and so do I and every other man that works for the railroad.

Q. What protection did this Erie Railroad afford to the men who were obliged to cross that track in the performance of their duties?

A. Well, if you mean it in this way, when an engine is moving a bell is ringing.

Q. Well, is that the protection that they are supposed to afford these men all the time, the ringing of a bell?

A. Yes, sir.

Q. Any other protection than that?

A. None, only what I have said to you, that——

Q. Well, you want to take that back, I think, don't you, that that is the only protection they had, by having one man watch out for the other man?

A. Why, it is not necessary for a man to watch out for another man.

Q. Why did you say that they did that, before?

A. You said what protection could he have.

Q. Oh, I asked you what protection they did have?

A. They did have.

Q. I can tell you the protection they could have had.

A. Every man that is a railroad man knows that he has got to look out for himself.

97 Q. Well, in any event you do admit this, don't you, that a man crossing that track had the right to assume that no train would be run along the track near the point where he was crossing without a bell being rung?

A. Well——

Q. Now, can you not give us yes or no to that?

A. Yes, I can give you "yes" to it, but——

Q. The answer to that is plain "yes," isn't it?

A. The engine came down there regularly.

Q. Did it——

Mr. von Bernuth: Let him finish, Mr. Robinson, please.

Mr. Robinson: No, no, he answered that question. He can sum up later on for you, if you want to let him.

Mr. von Bernuth: No, I want him to answer that question.

The Court: No, answer the questions.

Q. Now, Mr. Webb, you and I will get along all right if you will just try to answer what I ask you?

A. Well, I am, I am trying to do the best I can.

Q. Yes, I know you are. Now, I am asking you this, was not a man whose duties compelled him to cross that track justified in believing, from the way things were run in that yard, that no train would approach the place where he was obliged to cross the track, or no engine, without a bell——

A. No, sir.

Q. Now, you see, you don't know what I am going to ask you—without a bell being rung, to signal that it was coming towards him?

A. Well, the bells on the engines always are rung, coming down there, because they are going to the depot. That is a straight lead into the Erie depot.

Q. You surely understood that question, did you not, Mr. Webb?

A. Yes, sir, you said——

98 Q. Now, won't you answer yes or no?

A. I said, "Yes."

Q. There you are. Was that a rule of the yard requiring men to ring a bell, the men on the engine, either firemen or engineers, to ring the bell as they came along that track at the particular point where Szary was run down?

A. Yes, sir.

Q. That was a rule in the yard?

A. Yes, sir.

Q. And those bells, of course, when rung could be heard a good distance away?

A. Yes, they are big bells.

Q. A whistle was never used, was it?

A. Well, there is an ordinance in Jersey City against blowing any whistles around an engine yard.

Q. I understand. There are lots of ordinances in Jersey City that I know are violated every day. What I want to know is this, if the whistle was ever sounded when approaching this place where the men were constantly crossing?

A. Well, an engine going west might sound a whistle, but an engine backing down never does.

Q. An engine going west or east might sound the whistle?

A. Providing the view was clear; I would say that he should not.

Q. And I suppose he uses the same judgment sometimes in regard to the bell, does he not?

A. No, the engineer always starts his bell when he leaves the water crane.

Q. Never fails to sound it?

A. Oh, now, I couldn't say he never fails.

Q. That is just what you are saying, and you don't mean it, do you?

A. I don't intend to say that everybody does it, because I am not sure that everybody does.

Q. Well, now, this was a pretty bad night, wasn't it?

A. Yes, sir, it was a bad night.

99 Q. There is no doubt about that?

A. No, there is no doubt about that.

Q. It was a dark night in that yard, wasn't it?

A. A nasty, rainy night.

Q. A nasty, rainy night, and I say it was a dark night?

A. Yes, dark, yes; real dark.

Q. So that it was difficult to see almost anything in that yard that night, was it not?

A. Yes, sir.

Q. Even lights did not show out well, did they?

A. Well, you couldn't see them very good.

Q. So the answer to that is "Yes," is it not?

A. Yes.

Q. And what made it particularly difficult to see was the fact that the smoke that was being discharged from engines all around that yard did not rise up or dissipate, disappear; it hung like a heavy cloud close to the railroad bed, did it not, that night?

A. Well, I could not say that.

Q. Well, is that not what you meant when you said it was a nasty night?

A. No, sir.

Q. You did not think of the smoke or steam or vapor hanging in clouds close to the ground?

A. Oh, well, the atmospheric pressure, and things like that were heavy, of course.

Q. Well, these lights are rather small, are they not, that you have picked out in these pictures? They are not fixtures at all, are they?

A. They are two big incandescent lights, just like hangs from any pole in the city.

Q. I don't know, they look to me like lanterns?

A. Well, they are not, they are big lights.

Q. Well, that is just how big they are as is shown?

A. The lights are pretty high on the pole, if you notice.

Q. Yes, I was going to talk about that in a moment. Well,
100 anyhow, that is the light you refer to, isn't it (handing witness photograph)?

A. Yes, sir.

Q. Do you call that a large light?

A. Yes, an are light, yes, sir.

Q. Is it a large light?

A. Well—

Q. The answer is "no" to that, is it not?

A. I have not said so.

Q. I know. What do you say?

A. I say that it is a big are light, a drop light.

Q. As big as that (indicating)?

A. Well, I don't know as it is as big as that.

Q. Well, you know it is not one-fifth as big as that, don't you?

A. It is as round as that (indicating).

Q. Well, that is how large, a foot and a half?

A Juror: Two feet.

Mr. Robinson: Two feet?

The Juror: Two feet.

Q. That is the size of that light shown on that telegraph pole, is it?

A. I never measured the light, but it is as big as that (indicating).

Q. As big as this, two feet?

A. Yes.

Mr. Robinson: Well, anyhow, there it is, isn't it? I will mark this one myself.

(Marks "Webb" on Exhibit B.)

Q. Well, now, how high up is this, you say it is very high?

A. I don't know, I never measured the distance; pretty high.

Q. Fifty feet, do you think?

A. Oh, no; I should say thirty-five feet, maybe.

Q. How much?

A. Probably thirty-five feet.

A Juror: I cannot hear.

Q. Probably thirty-five. Well, on a night when the smoke and vapor created in the yard hung low, that light thirty-five feet
101 above the roadbed, would not very brilliantly illuminate the track, would it?

A. No.

Q. It would not be of any use at all, so far as lighting up the track was concerned, would it?

A. Well, it——

Q. What is the answer to that?

Mr. von Bernuth: Let him answer the question, Mr. Robinson. You didn't let him answer; now I watched you on that.

A. It would allow the light to reflect on the ground, so we could use the Browning hoist to clean the ashes out of the pit.

Q. What?

A. It allowed the light to reflect, even in the heaviest mist you can see the light.

Q. On such a night as you admit this was, a light such as this shown on this Defendant's Exhibit B, placed at least thirty-five feet above the roadbed, would not show much of a light on the track where you found this man's body lying?

A. Well, I could not say that the light would reflect over where this man was.

Q. Don't you know that it would not? That is what I want to find out. Be fair about this thing, Mr. Webb?

A. On a dark night, a nasty night like that was, I should say the light would not reflect.

Q. Yes. So the answer to that is "Yes," is it not?

A. Yes.

Q. Well, now, the first you knew of this accident was that—well, what was it, again? Tell us?

A. The first I knew of it was when I found him.

Q. Did you not hear anything before you found him?

A. Oh, I heard him groaning.

Q. Where were you at that time?

A. Coming from the water tub at the west end of the coal pocket down to my office.

102 Q. You didn't know at that time that an engine had gone over this place just before that, did you ?

A. Yes, sir; I sent the engine down there.

Q. Did you see it start off?

A. Yes, sir.

Q. What did you do, follow up the engine?

A. I walked down.

Q. Did you follow up the engine?

A. I did not exactly follow up the engine. I was going down to my office.

Q. Did you follow behind him?

A. I walked down between the ash pit and the lead.

Q. Did you follow behind the engine after you started it off?

A. No, sir, I walked between the pits; I did not follow the engine.

Q. The engine started up, sometime ahead of you, did it?

A. Oh, I should judge three minutes.

Q. Three minutes. Now, you had no reason at that time to be paying any attention to the actions of the men on that occasion, did you?

A. Yes, sir.

Q. What reason did you have for paying attention to what they were doing?

A. I had reason because he was blocking a passenger engine off.

Q. What?

A. I had reason because he was blocking off a passenger engine.

Q. Well, when you got him started there was no reason for your following him up or watching after that?

A. I was not following him up; I was going to my office.

Q. Well, did you give the engineer of that engine, or any of the crew, any order in relation to the engine?

A. Yes, sir, I told the engineer to back down and cross over on the pit, and get out of the way of this road engine.

Q. Did you tell him to hurry up?

A. No, not necessary to tell him to hurry up.

103 Q. He might not know what is necessary. I am asking you if you did tell him to hurry up?

A. No, I never told him; I did not tell him to hurry up.

Q. Who is the man you told anything to, what is his name?

A. Engineer Bratton.

Q. He is in court now listening to you, is he not?

A. Yes, sir.

Q. You saw the engine start up?

A. Yes, sir.

Q. And you saw that when it started it was running reversed, that is hind end foremost, is that right?

A. Yes, sir.

Q. And how far was the place where you last saw the engine from the place where you afterwards found Szary lying?

A. Well, I should judge 190 feet.

Q. Perhaps more than that?

A. What is that?

Q. Perhaps more than that?

A. No, I don't think it was any more.

Q. Well, at least?

A. Around that.

Q. That is practically two hundred feet?

A. Well, you see, he was not laying as far down as the coal pocket, the end of the pocket.

Q. I only want to get the distance. You say it was about, in your opinion, 195 feet?

A. 190 feet.

Q. 190. Well, we will stick to that, then. You had no more occasion to watch that engine after you saw it start off, did you?

A. I had occasion to watch it to see that he got out of the way, as I instructed him.

Q. Did you not rely upon the engineer and the crew getting out of the way after you told them to get it out of the way?

A. Yes, sir, but we have switchmen for that work, to switch these engines out. The engineer is not supposed to get off his engine.

Q. Were you going to follow it?

A. I was coming down to the office and in the meantime the engine had to cross over in front of me.

Q. Anyhow, you walked along some space in the wake of this engine, did you not?

A. The engine ran on the track here, and I walked out 104 here, between the ash pit and the track where the engine was.

Q. The engine got out of your sight, did it not, long before you got to the place where you found this man's body?

A. Oh, no, the engine was not out of sight. You could see the engine, you could see the reflection of the headlight.

Q. The headlight was toward you, was it not?

A. What is that?

Q. Where the headlight was on the rear of the engine?

A. This engine—there is a headlight on both ends of these engines.

Q. As it was running back did it have the headlight towards you lighted?

A. Yes, sir.

Q. Well, it was running reverse was it not?

A. You mean the engine was running backwards?

Q. Yes?

A. Why, no. The engine was running head on to me, but the engine backed up. Do you understand what I mean?

Q. It is more important that you should understand what I ask you, Mr. Webb. You say that you saw this engine start off?

A. Yes, sir.

Q. From some place?

A. From the water crane.

Q. About three minutes before it ran this man down?

A. Well, three minutes from the time that it left me until I was back where Szary was found.

Q. That is what I said. You saw this engine start off from the coal pockets?

A. Yes, sir.

Q. About three minutes before you found Szary lying with his leg off on the track?

A. Yes, sir.

Q. Now, at that time, this engine, when it started off, left you behind, did it not?

A. Yes, sir.

Q. And you say you saw it as it rolled away from you?

A. Yes, sir.

Q. Well, now, at that time it was reversed, was it not?

A. Yes, the engine was backing up.

105 Q. So the answer to that is plain "Yes," is it not?

A. That is it, yes.

Q. Now, you say as you looked at it you saw the headlight?

A. Yes, sir.

Q. Of course, that headlight was on the rear of the engine as it ran, was it not?

A. No, sir. The engine was running—the engine was headed west, and the headlight on the front of the engine is in front of the—on the smoke box, and the rear headlight was in back on the east end of the engine.

Q. (Handing witness paper.) That is the best I can do in such a short time to sketch an engine. That gives you an idea at least, which is the front of it and which is the rear of it, does it not?

A. Yes, sir. That is an engine.

Q. Well, now, this engine started away from where you were standing, did it not?

A. Yes, started back.

Q. And as it started away from you, this point (indicating) went first?

A. Yes, sir.

Q. The rear of the engine, is that right?

A. That is the position, yes.

Q. The headlight was here, was it not (indicating)?

A. Yes, sir.

Q. On the front of the engine?

A. Yes, sir, and another one here (indicating).

Mr. Robinson: We will come to that.

Mr. von Bernuth: Indicating the rear, Mr. Robinson.

Mr. Robinson: Yes.

Q. Anyway, that is the way it started away from you?

A. Yes, sir.

Q. Leaving you behind?

A. Yes, sir.

106 Q. And there is no doubt from what you found there afterwards, that this engine ran down this man when it was running rear end first, that is rear end foremost?

A. Well, probably it did. That is the only engine that passed down there, that I know of.

Q. So you know certainly it did run him down, rear end first, don't you know that?

A. Yes, that is the engine that was backing down.

Q. Well, then, "Yes," is the answer to that. How many men were on that engine, as it started away from you?

A. Well, there was an engineer, fireman, conductor; two brakemen, I believe.

Q. A conductor on it, too?

A. Yes, sir.

Q. Do you know how many men were on it? Did you see?

A. I was talking to the conductor at the water crane. When they left me the conductor and the brakemen got on the hind end of the engine. That is the east end of the tank going east.

Q. The engineer is Bratton, is he?

A. Yes, sir.

Q. What is the conductor's name?

A. I think his name is Robeson, I think his name is, or something like that, isn't it?

Q. And the fireman? Do you know the fireman's name?

A. I don't know. I don't just remember who the fireman was.

Q. Well, in any event, after you found this man lying on the track, Szary, you followed up this engine, did you not?

A. No, sir, I stopped and picked him off the track first.

Q. Well, after you did that?

A. Then I went down and chased the engine out of the way, and stopped it.

Q. Chased it out of the way? What way? Whose way was it in then?

A. I chased it out of the way for inspection. You cannot use an engine after a deed of that kind; you have to hold them up.

Q. You mean you have to inspect it after the commission or before?

A. You cannot use it until you get permission.

107 Q. Was that the reason, I mean, for the inspection, because it had run over this man?

A. Yes, sir.

Q. The engine seemed all right, didn't it, strong enough to take a leg off?

A. It seemed all right. I was sorry I had to take her out of service; I needed her bad that night.

Q. You did take her out of service that night, did you?

A. Yes, sir.

Q. Why?

A. That is the orders, for inspection. When a man is hurt with a locomotive you are not allowed to use the engine, whether she is a road engine or a yard engine.

- Q. Did you make any report on what you knew of this occurrence?
A. Only I reported to my superior officer. In regard to this man I told him that there was a man run over.
Q. Was that a written report?
A. Yes, sir.
Q. Signed by you?
A. Well, I never signed it. We had a big book, a big ledger.
Q. I don't know what you had. Did you sign the report you made?
A. I wrote it myself.
Q. Did you sign it?
A. Sign my name to it?
Q. Did you write it in full yourself and sign your name to it?
A. Yes, sir, I wrote it, but not signed it.
Q. Have you seen it lately?
A. What?
Q. You heard me?
A. No, I never saw it from the time I wrote it, never looked at it.
Q. Did that engine get a particular number that night, or did it have the number all the time?
A. What is that, again?
Q. Did the engine that ran the man down have a number, that it was using that night, or did it have the same number all the time?
A. It had the same number all the time. It is engine 104.
Q. Are you sure it was 104?
A. I believe it was.
108 Q. Was 103 working that night?
A. Yes, sir. I don't know whether she was working that particular night or not, but she was there.

Mr. Robinson: Well, Mr. von Bernuth, that is the reason I asked that question. Will your Honor pardon me just a moment (confering with Mr. von Bernuth over a paper)?

- Q. Who was the engineer of 103 that night, Mr. Webb?
A. I could not recall.
Q. Did you in your report state the number of the engine that ran this man down?
A. Yes, sir.
Q. How long had Mr. Szary been employed there before this night, about?
A. Well, I could not say just how long he was there. I could not just say how long he had worked for the company.
Q. You know this place where the men got their drinking water, do you not?
A. I know where they went to get the drinking water in the engine room.
Q. Yes, you do know?
A. Yes, sir.
Q. And that drinking water was kept there for their use, was it not?
A. Well, the water is there for the gas engine. Of course, these

men frequent this place to go and get a drink, but there is a valve there and they go there and drink when they want.

Mr. Robinson: I think that is all.

Redirect examination.

By von Bernuth:

Q. This freight on ferryboats, what did you mean by that, that freight was carried over from Jersey City to New York on ferryboats?

A. I have got nothing to do with that.

Q. What ferryboats are you referring to?

A. He was talking about the ferryboats, I wasn't saying
109 nothing about them. He said there was freight carried back and forth over the ferryboats. I am not the yard master.

Q. He said, yes. What do you mean by that, what freight are you referring to, freight carried in wagons?

A. I didn't say nothing about that, Mr. von Bernuth. The lawyer said, "Don't you know there is freight carried back and forth?" Of course I know it. I see wagons with freight on them going back and forth.

Q. Is that how the freight is carried, on the ferryboats?

A. That is according to his estimate. That is the way I understand.

Q. You said, yes?

A. He said yes?

Q. You said yes?

A. I said I saw wagons loaded with freight, of course I did. I don't know where the freight comes from.

Q. Those are not Erie Railroad wagons?

A. They haven't got any wagons.

Recross-examination.

By Mr. Robinson:

Q. No, but the freight is carried by the Erie Railroad, is it not, carried to the Jersey City point?

A. What do you mean, on floats?

Q. You know very well what I mean, don't you?

A. That don't interest me about these boats and wagons. I have got nothing to do with boats and wagons.

The Court: Answer his question.

Q. I say, the freight that you were saying in answer to my questions that you saw daily carried over from the Jersey City yard on the ferryboats, that was freight that came in on your trains, was it not?

A. I could not say that. I could not say where the freight was carried from, because I am not in the freight yard.

110 Q. Did you not see some of it taken right from the freight trains to the ferryboats?

A. Did I see it? No, sir.

Q. Well, you did see freight cars loaded with freight?

A. Oh, yes.

Q. That were drawn in by locomotives on your road from points west of Jersey City; you saw freight cars run in on lighters loaded with freight and carried over to New York, did you not?

A. I have often saw cars going on west, yes.

Q. The answer to that is that little "yes" again, is it not, too?

A. Yes.

Q. Mr. Webb, I would like to have you answer these questions?

A. Yes, I have saw those cars loaded on lighters.

Mr. Robinson: That is all.

Redirect examination.

By Mr. von Bernuth:

Q. I show you this diagram which was drawn by Mr. Robinson—and I ask to have it marked for identification.

Marked Defendant's Exhibit D for Identification.

Q. (continued). Is there any headlight on the engine that is indicated on this diagram Defendant's Exhibit D for Identification, which was prepared by Mr. Robinson?

A. They have a headlight in front and rear.

Q. Is there any headlight indicated on the rear of that engine?

A. No, sir.

Q. Will you please put a headlight with a pencil on that diagram, where it was at the time of this accident?

111 A. (Marking on diagram.) The headlights, they have a door that opens to the side to allow them to be filled and cleaned.

Mr. von Bernuth: I offer this diagram in evidence. Any objection, Mr. Robinson?

Mr. Robinson: I don't suppose I can object to it. I drew it myself.

Defendant's Exhibit D for Identification marked in evidence.

Mr. Robinson: The rear headlight is a great deal larger than the front one, is it not, according to this drawing?

The Witness: Well, they are both that size, about.

Q. I will mark this addition you have placed on the diagram, "Rear headlight." Is that correct?

A. Yes, sir.

Q. And the other one is the front headlight?

A. Yes, sir.

Mr. von Bernuth: I will mark it "front headlight."

Q. Do you know whether or not the rear headlight was lighted on that night on engine 104 before the accident?

A. Yes, sir, I know the headlight was lighted, because my attention was drawn to it by the rear headlight on the engine when I was going to the engine, on account of having the Hackensack engine blocked off.

Q. In other words, you know that an engine was at the crane before you went to tell them to get out of the way?

A. Yes, sir.

Q. When I say the crane, I mean the water crane?

A. Tub.

Q. I show you Defendant's Exhibit B, and ask you to point out the engine room on that picture?

A. Do you want me to mark it?

112 Q. No, I will mark it. Just point it out?

A. There is the engine room right there (indicating).

Mr. von Bernuth: I will mark that "Engine room."

Q. And is that the water tank?

A. This is the water tank here, yes, sir (indicating).

Mr. von Bernuth: I will mark that "water tank."

Q. There has been no change in the situation between the time of the accident and today, has there?

A. No, sir.

Q. Were there other engines in the vicinity at the time this accident happened?

A. Well, there were——

Q. I mean, on other tracks, in addition to the coal pocket track?

A. On the ash pits.

Q. And were those engines moving?

A. No, sir, they were getting their fires cleaned, outside the Hackensack engine.

Q. Was that moving?

A. She was moving down from the switch to the water tub, where engine 104 stood.

Q. And was she ringing a bell or blowing a whistle?

A. She was to- far up, Mr. von Bernuth; she was up at Grove Street, coming down.

Q. You had sent her up there?

A. Yes, sir; I saw that she went up there.

Q. Was there anything unusual in an engine backing up along the coal pocket track?

A. Not that I recall.

Q. As a matter of fact is that not the usual way engines go back down on the coal pocket track?

A. Yes, sir, all hurry-up engines come down the north side, engines going out on trains; all engines that are going to stay in go down on the south side of the pocket.

113 Q. When you say a "hurry-up" engine, what do you mean by that?

A. An engine that is running on a timetable schedule of

trains, where an engine comes into Jersey City and, say, she gets in at 6:10 this evening, and goes out at 7:25, she is due on that side of the pocket.

Q. That is, they are also known as short-run engines?

A. Yes, sir.

Q. Engines which run on suburban trains?

A. That is the idea.

Q. Go out to Montclair and Greenwood Lake; not Greenwood Lake, but Great Notch and Caldwell?

A. Northern and all through.

Q. And they come in and bring a train in, and in about an hour they go out again?

A. Yes, sir.

Q. And they turn on the turntable before they dump their ashes on the pits?

A. Yes, sir.

Mr. Robinson: This is leading. I object to leading on re-direct examination.

Mr. von Bernuth: I can ask that.

The Court: Go ahead.

Q. After they leave the turntable they go over the ash pits?

A. Yes, sir.

Q. And then they cross over some switches and back down to the coal pockets?

A. Yes, sir.

Recross-examination.

By Mr. Robinson:

Q. Only the hurry-up engines are not reversed, is that it, back over this track, is that what you mean?

A. Well, you understand what I mean by that is, the engines that has got a set of runs, where they are not allowed to go down on the south side of the coal pockets, to get blocked in with other engines that remain in a limited time.

Q. Well, I suppose really what it means, a hurry-up engine means an engine that is in a hurry all the time, that is about the
114 size of it, is it not?

A. No, but a hurry-up engine means this; it means an engine that comes in on a local train, comes to the turntable and turns and goes on the——

Q. And they need it quickly to use right away?

A. Need it within a space of time, where you have to keep this engine from getting mixed up with the other ones.

Q. So it has to go through as quickly as it can, and move rapidly, to prevent it getting mixed up with anything else, is that not it?

A. That is what you have to do, you have to see that they do not do that.

Q. And this was a hurry-up engine that ran this man down, was it not?

A. No, this was a bobtail engine.

Q. What is the difference between a bobtail and a hurry-up?

A. Well, a bobtail—

Q. Well, anyhow, this engine that ran him down was running reversed, was it not; there is no doubt about that?

The Court: He says it was.

A. The engine was backing up, yes.

Q. I understood him to say that only hurry-up engines did that. By the way, Mr. Webb, there have been some changes in that general situation since this accident, have there not? There has been some changes there since the night this accident happened, have there not?

A. I have not seen many.

Q. Well, somebody suggested, I think, during this trial, that that fence was not there at the time of this accident. What about that?

A. What fence is that?

Q. (Indicating on photograph)?

A. Oh, that fence has been there for years.

Mr. Robinson: Well, perhaps that is my mistake.

115 The Court: A juryman wants to ask a question.

Juror No. 2: Yes, your Honor. I do not want to interrupt the attorneys, but I understood Mr. Webb testified that he heard a groan; he had to go awhile, he couldn't see anything and then he found Szary.

The Court: Yes.

Juror No. 2: How long after that did he find him, how far did he have to go to find him?

The Court: Answer that.

The Witness: Why, probably from here to you (about ten feet). You must understand there is a big building here that shades that place (indicating on photograph). It don't make no difference how bright the night is, the reflection of this big building is down on the ground.

By Mr. Robinson:

Q. You mean the shadow of the big building?

A. The shadow, yes. And where Szary lay was on what I would say, on the left rail walking west, and he was in between the two rails. His body was located like that (indicating), and this leg (left leg) was over the rail, and he was inside the rail.

Juror No. 2: His legs were sticking out toward the building?

The Witness: His legs towards the coal pocket, yes.

Juror No. 2: Thank you.

Q. What you mean, Mr. Webb, is that you were unable to see this man's body lying there until you got about as near to him as you are now to the second juror, is that right?

A. You understand, I was walking and I heard this groan.
116 Q. He asked you how far you were away from him when you first saw him, and you said, "About the difference between me and you," meaning the jurors?

A. I walked up toward him until I came to him. I heard him groaning, and I stopped, and when I heard where it was I walked over there and picked him up.

Q. You were able to see him for the first time when you were about the distance from him as you are from this second juror now, is that right?

A. Well, about that distance away.

Mr. Robinson: That is about ten feet, sir; ten or twelve feet?

Juror No. 2: Ten or twelve feet.

Redirect examination.

By Mr. von Bernuth:

Q. When you talk about the left rail walking west, you mean the rail which was nearer to the coal pockets?

A. Yes, sir.

Q. Can you pick out on this photograph, Defendant's Exhibit C where you were walking as you went down from the water crane down towards your office?

A. I walked right down here, sir (indicating).

Q. Indicate by a line? (Witness indicates.)

Q. Is there plenty of room to walk there without being hit by engines on either track?

A. Yes, sir.

Mr. Robinson: I object to that as calling for a conclusion.

The Court: I will take it.

Exception to the plaintiff.

Q. How far apart are the tracks there where you found Szary?

A. Between the ash pit and the——

117 Q. Between the ash pit track and the first rail of the track next to the coal pockets?

A. Why, I should estimate between twelve and fifteen feet.

Juror No. 2: What is the approximate height of this building I would like to ask?

The Court: What is the height of the building?

Juror No. 2: The tallest one.

The Witness: How high? I couldn't tell; pretty high.

Juror No. 2: Approximately?

The Witness: Two stories and a half.

By Mr. Robinson:

Q. You say that lantern is up thirty-five feet, don't you?

A. What?

Q. The lantern on the pole?

A. That is not by the coal pocket; that is on the ash pit.

The Court: Is there anything else of this witness?

Mr. von Bernuth: I would like to recall him afterwards to fix places on a diagram.

The Court: There has not been any change since the time of the accident, to the present day?

The Witness: No, sir.

The Court: Just the same?

The Witness: Just the same. Everything is laid out just the same.

The Court: That covers it. He says the conditions are the same right at this time.

Recess.

118

Afternoon Session.

ROBERT P. ZOURNER, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. von Bernuth:

Q. Zourner, are you a civil engineer?

A. Yes, sir.

Q. How long have you been practising that profession?

A. Thirty years, about.

Q. And have you prepared a map in connection with this case, showing the location of the coal pockets, the sand house, water tank, pump house, and the surrounding tracks?

A. I did.

Q. Is the map made to scale?

A. Yes, sir.

Q. And what is the scale on which you made the map?

A. One inch equals twenty feet.

Q. And all the lines on the map are drawn to scale?

A. They are.

Q. I show you a paper and ask you if that is a copy of the map that you prepared?

A. It is.

Mr. von Bernuth: I offer it in evidence.

Blueprint marked Defendant's Exhibit E.

Q. Now, the tracks shown on this map run substantially in what direction?

A. Northwest and southeast.

Q. Well, normally it would be called east and west?

A. East and west.

Q. That is, the tracks abut on the river and run from there towards the hill?

A. Towards the hill, yes.

Q. Leaving the river at approximately right angles?

A. Yes, sir.

119 Q. This arrow here with an N at the top of it and an S at the lower end of it on the left-hand side, indicates the true north?

A. Magnetic north.

Q. The magnetic north. The buildings which you have colored yellow in the middle of the map are the buildings that we have been talking about, the coaling station, the water tank and the sand house?

A. They are.

Q. The coal pockets are called on this map the coaling station?

A. It is.

Q. And the sand house is called the sand drying tower?

A. Yes, sir.

Q. And the water tank is called the water tank?

A. Yes, sir.

Q. And the engine room is here called a pump house?

A. Pump house, right.

Q. This place which you have labeled "Sand Storage," situated between the coaling station and the sand drying tower, which we have called the sand house, is that open or covered?

A. It is open.

Q. And the place which is called "Sand Storage" lying to the east or toward the river from where the sand house is located, is that open or covered?

A. Covered.

Q. And was there sand in both of those places when you were there?

A. There was.

Q. Is the spot which we have called the ash pits shown on this map?

A. They are.

Q. Where are they located?

A. In reference to the map, directly north of the coaling station.

Q. Those ash pits are located where the words "Iron Grating" are written, and on the tracks on either side of the iron gratings?

A. Yes, sir.

Q. And the tracks themselves are open, are they not, between the rails?

A. Yes, sir.

Q. And between the tracks are these iron gratings?

A. Yes, sir.

120 Q. And the engines come on the pit and drop the ashes in between the rails?

A. Right.

Q. Between the first ash pit track to the north of the coaling sta-

tion and the coal pocket track which is next to the coaling station, is there a grating or is there ballast, or what?

A. Cinder ballast.

Q. Is it level?

A. Practically level.

Q. And extends between the first rail next to the ash pits, as far as the track next to the coal pockets?

A. Yes, sir.

Q. Mark the track immediately to the north of the coal pocket, as the coal pocket track or lead?

A. (Witness marks on the blueprint.)

Q. Now, tell me the distance between the outside of the rails of the coal pocket track, as it is indicated on this map, Defendant's Exhibit E, and the nearest rail of the first ash pit track at the easterly end of the ash pits?

A. (Measuring with scale.) Twelve and one-half feet.

Q. What is the extreme width of the space between the coal pocket track, as indicated on this map, and the first ash pit track between the water tank and the sand house?

A. Fourteen feet.

Q. What is the width or the distance between the coal pocket track and the first ash pit track at a point opposite the west end of the coaling station where the pump house begins?

A. Seventeen and one-half feet.

Q. Seven or seventeen?

A. Seventeen and one-half feet.

Q. No, you do not understand me. The distance between the outside rails of the coal pocket track and the first ash pit track?

A. Excuse me, I thought you said the coal pocket. Seven and one-half feet.

Q. And from seven and one-half feet to fourteen feet, the greatest width, those tracks diverge evenly until they reach the greatest distance you have mentioned?

A. They do, yes, sir.

121 Q. What is the distance from a point opposite the middle of the pump house which we have called the engine room, to the east end of the ash pits?

A. 134 feet.

Q. Now, on the right-hand side of this map is toward the east, is it not?

A. Yes, sir.

Mr. von Bernuth: I will write "east" with an arrow indicating.

Q. On the left-hand side of the map goes to the west?

A. West.

Mr. von Bernuth: I will write the word "west" with an arrow indicating.

Mr. Robinson: Why don't you make the north point at the top of the diagram, and then we will know the others?

Mr. von Bernuth: I will put the letter "N" on the north side of the map, and the letter "S" on the south side of the map.

Q. Does this map show the position of any lights at or about the ash pits?

A. It does.

Q. Where are those lights?

A. One located between the two gratings at the west end of the ash pit, and one on the east end of the ash pit between the two gratings, and one down at the turntable.

Q. That is, toward the east?

A. Towards the east, yes, sir.

Q. And east of the sand house?

A. East of the sand house.

Q. What character of lights are they?

A. They are the ordinary street arc lights.

Q. And how are they placed?

A. They are placed on poles.

Q. And how high would you say those lights are placed?

A. Between twenty-three and twenty-seven feet high.

122 Q. What is the distance from the arc light at the east end of the ash pit to the center of the coal pocket track?

A. I do not understand your question.

Q. What is the distance from the arc light at the east end of the ash pit to the center of the coal pocket track?

A. Forty-two feet.

Q. And what is the distance from the arc light at the west end of the ash pit to the center of the coal pocket track?

A. Thirty-five feet.

Q. What is the distance between the side of the coaling station and the nearest rail of the track immediately north of it, which is the coal pocket track?

A. Four feet.

Q. And that distance is uniform the whole length?

A. Parallel with the coal pocket.

Q. And what is the character of the ground in between that rail and the side of the coal pockets?

A. Cinder ballast, the same as between the two other tracks.

Mr. von Bernuth: May I recall Mr. Webb, and have him mark on this?

The Court: Yes.

THOMAS F. WEBB, recalled:

Direct examination.

By Mr. von Bernuth:

Q. Mr. Webb, I show you this map, which is in evidence as Defendant's Exhibit E, and ask you if you understand it?

A. Yes. There is your ash pits (indicating).

Q. The house labeled "Pump House" is the engine room?

A. Yes.

Q. The coaling station is the coal pockets?

A. Yes.

Q. And this building labeled "Sand Drying Tower" is the sand house?

A. Yes.

123 Q. And the track here immediately north of the coaling station, the top of the map being north, is the coal pocket lead or track?

A. Yes.

Q. Now, can you pick out on that track where you found Szary's body?

A. Well, this map is looking in the opposite direction, ain't it?

Q. This is east, toward the river (indicating). This is west. Here is your water tank here?

A. I see. Szary's body was right here, see (indicating).

Q. Make an "X"? (Witness marks on blueprint.)

Q. No. You found it between the rails, did you not?

A. Yes. Do you want me to put it in between the rails?

Q. I want you to put it in between the rails where you found the body.

Mr. Robinson: He wants you to put it where you found it, Webb?

A. Well, there it is.

Mr. Robinson: Where did you find it?

Q. Did you find it in between the rails, or outside?

A. In between the rails. I have got it marked there, ain't I?

Mr. von Bernuth: I am going to rub out the other (erases).

By Mr. Robinson:

Q. Just to save time, where is the place where the men got their drinking water? Can you put that there?

A. Here (indicating).

Mr. von Bernuth: The witness indicates the place marked "Pump House."

Q. Is that the only place they could get drinking water?

A. No, there is other places, but not in the coal pocket, you know.

124 Q. Is there any down there (indicating)?

A. Why, right over here across the tracks, across four tracks, there is a hydrant there.

Q. Did you use that to get drinking water, too?

A. Some of the engineers and firemen drink out of it.

Q. All right, put a mark there.

Mr. von Bernuth: Put a mark where the hydrant was across four tracks.

Mr. Robinson: Say a figure "2." Put the figure "2" there. You are sure about this, are you?

The Witness: Yes, I am sure of it. Right over here, see (indicating); the track known as L track, between L and the turntable track.

Q. Is there any drinking place or place where the men could get water to drink, in here anywhere (indicating)?

A. In here? No, sir.

Q. No, no, in here; not in here, in here (indicating)?

A. No, sir.

Q. You are sure of that, are you?

A. Yes, sir.

By Mr. von Bernuth:

Q. The switch that this engine was going to cross over the coal pocket lead to the ash pit track was where, Engine 104?

A. Well, see, here is this lead here. You have got to come down here to this switch, and go across to get to the pit, see?

Q. Mark the points of that switch, "Switch to ash pits"; or I will mark it?

A. Mark it right here (indicating).

Q. The point that I have marked "Switch to ash pit track" is the switch which the engine had to back down to and use to go back on the ash pits?

A. Yes, sir.

Q. From the coal pocket track?

A. Yes, sir.

125 Q. So that the engine, in following your orders had left the water tank and was backing to a point just east of the switch to the ash pit track?

A. Yes, sir.

Q. At the time of the accident?

A. Yes.

ROBERT P. ZOURNER, resumed the stand:

Direct examination.

By Mr. von Bernuth:

Q. What is the distance from the pump house to the east end of the coal pockets, the coaling station?

A. What particular point?

Q. Well, really, take the length of the coaling station?

A. 187 feet.

Q. Now, Pavonia Avenue runs somewhat to the south of the map?

A. Yes, sir.

Q. And substantially parallel with the tracks?

A. Yes, sir.

Q. And these tracks which are curving around here to the left-

hand side of the map, toward the south, one of which is called "Elevator Lead," run across Pavonia Avenue?

A. They do.

Q. Both of the tracks that curve together around the end of the map toward the left-hand side, go into Pavonia Avenue?

A. Yes, sir.

Q. And cross into the south side yard?

A. Yes, sir.

Q. And near the tracks on the right-hand side as you look at the map is a building which is called "Oil House"?

A. Yes, sir.

Q. And how far is the oil house from the middle of the coal pocket track at the water tank?

A. 146 feet.

No cross-examination.

126 JOHN LEWICKI, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. von Bernuth:

Q. Mr. Lewicki, where do you live?

A. 618 Jersey Avenue, Jersey City.

Q. Talk up so the last juror can hear you?

A. 618 Jersey Avenue, Jersey City.

Q. You lived in Jersey City last year, in the springtime?

A. Yes, sir.

Q. And are you an interpreter?

A. Well, I do some interpreting sometimes, not very often.

Q. Were you the interpreter at the examination of the plaintiff in this action?

A. Yes, sir.

Q. In an examination before trial in a New Jersey suit?

A. Yes, sir.

Q. And in that action were you interpreting the questions of counsel to the witness, and did the witness answer you and did you in turn interpret his answers to the stenographer?

A. Yes, sir.

Q. And did you correctly interpret the questions of counsel to the witness?

A. Well, I interpreted the questions that I was asked.

Q. I say, did you interpret to the witness the questions that were asked by counsel for the railroad and by counsel for the plaintiff?

A. I think I did.

Q. Well, you did, did you not?

A. Yes.

Q. And did you correctly interpret the answers that the witness gave you to the stenographer?

A. Yes, sir.

Q. What language did you talk to the witness?

A. Polish.

Q. And did you have any difficulty in making yourself understood?

A. I don't think I did.

Q. Well, don't you remember now whether you did or did not?

A. Well, he seemed to understand me plainly, what I said to him.

127 Q. At any time during the course of the examination did Szary tell you that he did not understand the questions as you were putting them to him?

A. I don't remember it.

Q. Don't you remember now whether or not during the course of the examination the plaintiff made any statement to you that he could not understand Polish as spoken by you?

A. I don't remember that.

Q. Your recollection is that he did not make any such statement?

Mr. Robinson: No, he did not say that at all.

The Court: That is leading.

Q. Well, do you, or do you not?

A. No, I could not say if he did or not. This is almost a year; I cannot remember clearly what happened at that time.

Q. Well, do you have any recollection of any difficulty in interpreting in the course of that hearing?

A. No, I don't remember any.

Cross-examination.

By Mr. Robinson:

Q. Were you born in Poland, Mr. Lewicki?

A. No, sir.

Q. Were you born on the other side?

A. No, sir.

Q. Or in this country?

A. In this country.

Q. And what you know of the Polish language you picked up in this country, is that right?

A. Well, my parents—I am Polish.

Q. Well, I say, what you learned of the Polish language, what you know of it, you learned in this country, not over in Poland?

A. Yes.

128 Q. And when you were called in to interpret on this occasion that Mr. von Bernuth has been speaking of, you did the best you could, I suppose, did you not?

A. Yes, sir.

Q. Did Szary appear to you to be in bad shape physically at that time?

Mr. von Bernuth: I object to that as incompetent and immaterial.

Q. How did he appear to you at that time?

Mr. von Bernuth: If your Honor please, I object to that as incompetent, irrelevant and immaterial. That is not anything that the witness has been interrogated about.

The Court: Do you mean as to mentality, understanding?

Mr. Robinson: Yes.

The Court: I will take that. Overruled.

Exception to the defendant.

A. How he was feeling?

Q. Yes?

A. Well, his leg bothered him yet, he said.

Q. What?

A. His leg was not quite healed up yet.

Q. Was he in bed at the time?

A. No, he was sitting on a couch.

Q. But he was evidently an invalid at the time, and suffering from some injury, was he not, as he appeared to you?

A. Well, his leg was not quite well yet.

Q. Yes?

A. He said it was aching him.

Q. What particular part of Poland does he come from, do you know?

A. Who, Szary?

Q. Yes?

A. I could not tell you that.

Q. Well, are there various languages or dialects—

The Court: What do you want to be bothering with this for?

Mr. Robinson: Well, that is all.

129 WILLIAM THOMAS BRATTON, called as a witness in behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. von Bernuth:

Q. Mr. Bratton, were you the engineer of Engine 104, the night this accident happened?

A. Yes, sir.

Q. And what was the work of 104 that night, switching cars around the yard?

A. Yes, sir.

Q. And before the accident had happened, where had you been switching cars?

A. Well, I was switching cars over on the south side first, or over on the north side first, and then when we got done over there, why we crossed over and came down on the north side to do some more switching, to get a train to bring across with us.

Q. After you got through with that switching, did you come to the water tank?

A. Yes, sir.

Q. And did you have a crew connected with the switching engine?

A. What?

Q. Was there a crew connected with the switching engine?

A. A crew?

Q. Yes.

A. There was a crew, but there was only one man on the engine.

Q. I know, but that night you had a crew connected with the switching engine?

A. Yes, sir.

Q. There was yourself and a fireman on the engine?

A. Yes, sir.

Q. And a conductor and several brakemen who were moving the cars around and coupling and uncoupling, and turning the switches?

A. Yes, sir.

Q. And that is what is known as a switching engine and a crew?

A. Yes, sir.

Q. Which constitutes, with the engineer and fireman, from five to six men?

A. Well, there is a conductor and two brakemen.

130 Q. Well, an engineer and a fireman makes five?

A. Yes, sir.

Q. Who was your conductor that night, do you remember?

A. I think his name was Brown, I am not sure; I think his name was Brown.

Q. And did you have another brakeman on the engine with you, named Hammell?

A. Yes, sir.

Q. Do you remember who your fireman was?

A. Yes, sir, his name was McCarthy, Joe McCarthy.

Q. Now, coming down to the time that you took water, did you go to a water tank for water?

A. Yes, sir.

Q. How was your engine headed?

A. The engine was headed west.

Q. Did you have a headlight on that engine?

A. Yes, sir.

Q. Did you have more than one headlight on the engine?

A. I only had one on the engine, and one on the tender.

Q. The other one was on the tender?

A. One on the tender.

Q. Where was the headlight on the tender?

A. Why, out on the back of the tank.

Q. And that headlight pointed toward the east, or the river?

A. Yes, sir.

Q. I show you Defendant's Exhibit C, and ask you whether the headlight on Engine 134, or the tank of Engine 104, on the night of the accident, was similar to the one shown on the engine in that picture?

A. Yes, sir.

Q. And you had a tank or a tender connected with 104, similar to the tender shown on this picture, Defendant's Exhibit C?

A. Yes, sir.

Q. And does this picture, Defendant's Exhibit C, show an engine and a tender, switch engine, standing next to the coal pockets, on the coal pocket track?

A. I don't see any engine there.

131 Q. Don't you see an engine right there (indicating)?

A. There is an engine there, yes.

Q. Is it not standing right next to the coal pockets?

A. Yes, sir.

Q. Does not that picture show an engine standing next to the coal pocket on the coal pocket track?

A. Yes, sir.

Q. Your engine was headed the other way from that shown in this picture?

A. Yes, sir.

Q. Were the headlights on your engine and on the tank lighted that night?

A. Yes, sir.

Q. As you were standing at the water tank?

A. As I was what?

Q. As you were standing at the water tank?

A. Yes, sir.

Q. I mean, as your engine was standing at the water tank?

A. Yes, sir.

Q. And were they lighted after the accident?

A. Yes, sir.

Q. You had been switching around in the yard just before you came to the water tank?

A. Yes, sir.

Q. Now, did you get any orders while your engine was standing at the water tank?

A. Yes, sir.

Q. Who gave those orders to you?

A. The engine dispatcher, Mr. Webb.

Q. Who has already been on the stand?

A. Yes, sir.

Q. And what did he tell you to do?

A. Told me to back down out of the way of the Hackensack engine, that he only had three minutes to leave the dock.

Mr. Robinson: A little louder with that, please. What is it?

The Witness: Why, he told me to back down out of the way of the Hackensack engine, that he only had three minutes to leave the dock.

Mr. Robinson: Leave the dock?

132 The Witness: Yes, sir, leave the depot. They generally call it the dock, the depot.

Q. And how did he tell you to get out of the way?

A. Told me to back on down and come up over the ash pit.

Q. The switch that you were going to use, can you identify it on this plan, Defendant's Exhibit E?

A. I don't know much about plans.

Q. You don't understand it?

A. No.

Q. Was the switch that you were going to cross over from the coal pocket track to the ash pit track, located east of the sand house?

A. Yes, sir.

Q. A little distance east of the sand house?

A. Yes, sir.

Q. And then you were going to come back up again toward the west on the ash pits?

A. Yes, sir.

Q. Now, after you received these orders from Mr. Webb, what did you do?

A. I backed on down, I got out on the—I was oiling the engine around.

Q. You was what?

A. I was oiling the engine around, and Mr. Webb came down and told me to get out of the way of the engine. I got up on the engine, and I blew the whistle three times, and then I pulled the bell with the bell rope and backed on down slowly, because it was——

Q. On the coal pocket track?

A. On the coal pocket track.

Q. When did you first know that anything had happened?

A. I didn't know anything happened until the brakeman, who was on the front end of the engine, hollered, "Whoa."

Q. Where was what you call the front end of the engine, on which the brakeman was standing?

A. Why, up where the—up at the front end of the engine.

Q. Was the front end of the engine on the east or the west end?

A. The front end of the engine was on the west end.

133 Q. So that was the rear end as the engine was running?

A. As the engine was backing up, yes, that was the rear end.

Q. Do you call the front end of the engine the place in front of the boiler?

A. Yes, sir.

Q. Now, who was on the engine at the time she backed, besides yourself?

A. The fireman.

Q. And the brakeman?

A. The brakeman.

Q. Anybody else?

A. Nobody else that I seen.

Q. Do you know where Mr. Brown had gone, the conductor?

A. No, I don't know where he went to.

Q. And do you know where the other brakeman was?

A. No, I didn't know the other brakeman.

Q. What kind of a night was it?

A. Well, it was raining, it was pretty foggy around the ash pit.

Q. Where were you sitting or standing as the engine was moving backwards?

A. I was standing in the cab, in the right side.

Q. And did you look ahead or behind?

A. I was looking behind; I was backing up.

Q. You mean, you were looking in the direction in which the engine was going?

A. Yes, sir.

Q. You call that behind, because it looks toward the rear end of the engine?

A. Yes, sir.

Q. And how far were you able to see?

A. Well, I could only see about as far as the headlight.

Q. On the tank?

A. On the tank.

Q. Now, the run that you were going to make before you stopped and started to go west again, was as far as a point just east of the sand box?

A. Before I was going to come up on the ash pit, you mean?

Q. Yes; you were going to run down as far as a little to the east of the sand box?

A. Yes, sir.

Q. And then you were going to stop and go west again?

A. Yes, sir.

The Court: Some juryman wanted to ask a question about the headlights, wanted to know how far the headlight extended
134 to throw its rays.

The Witness: How far out it showed, the view of it?

The Court: Is that the question?

Juror No. 9: On ordinary occasions, not that particular night.

The Court: You have to confine it to this particular night.

Mr. Robinson: Well, I suggest, your Honor, that I was going to ask that same question myself, a little later on.

The Court: Go right on and ask it. He will leave it to you.

Cross-examination.

By Mr. Robinson:

Q. You say that you were looking ahead of the locomotive as you moved, before this accident?

A. I was looking ahead?

Q. I understood you to say, when the railroad lawyer asked you, that you were looking ahead of the engine as it moved that night, looking along the track as well as you could?

A. I was looking the way it was going.

Q. Ahead of you in the direction in which you were going?

A. That is the way I was looking and the way I was going.

Q. Yes, and you also told the lawyer for the railroad, that as far as you could see, looking in that direction, was only as far as the headlight on the tank?

A. That is all the further I could see, with the fog and smoke around there.

Q. Well, you meant to be understood, when you said that, as

meaning that you could not see beyond the end of your tender, is that right?

A. Yes, sir.

135 Q. The conditions around there were as bad as that, that you were prevented by those conditions from seeing any further, really, than about the end of the tank that you were pushing?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now, on an ordinary night, that is, a fairly clear night, when it was not raining, and when there was no fog or mist, about how far ahead of the end of your tank could you see, looking in the same direction as you were looking that night?

A. Well, I could not really say how far I could see.

Q. One hundred feet or so on the track?

A. I could not say that.

Q. Well, we don't expect you to be exact. Can you not give us some idea?

A. Well, I really don't know how far the light would show.

Q. Anyhow, you could see a considerable distance ahead of the end of the tank, could you not?

A. I don't know how far I could see ahead of the tank.

Q. You said that, and then I asked you if you could not see some distance ahead of the end of the tank?

A. Well, I really could not say how far I could see with the headlight; some headlights.

Q. At any rate, you could see a good deal further on ordinary clear nights than you could on the night Szary was run down, could you not?

A. Oh, yes, you could see better on a clear night than you could on the night I was switching.

Q. You could see further, a good deal further?

A. Yes, sir.

Q. How many men were on that engine? You said at first, I understood, that only you and some other man were there, was that right?

A. Why, there were me and the fireman and the brakeman.

Q. That would be three altogether?

A. Yes, sir.

Q. Were you together on the engine, were you at the same point or about the same point on the engine?

136 A. No, we were not together. As I said before, the brakeman was on the front step of the engine, backing up. He was on the front end of the engine, what we call the front end of the engine; and the fireman, he was—I don't know if he was working at his fire or—

Q. Let us deal with the brakeman first. Was he ahead of you as you rode just before this accident?

A. Well, no, he was behind me.

Q. Who was the furthest of the three, which one of the three was the furthest front?

A. Which one of the three was the furthest from me?

Q. Furthest front, the nearest to the front end of the engine as it moved? That would be the rear end of the engine really?

A. Why, the brakeman.

Q. Who was the man that would have reached the place Szary was run down, first, as you rode?

A. Why, the brakeman would.

Q. What is his name?

A. Hammell.

Q. Is he in court now?

A. Yes.

Q. Was he in the tank, the tender?

A. No, he was on the front end of the engine.

Q. The very front end?

A. Yes, sir, right on the step.

Q. And he was really riding ahead of the whole engine structure, was he not?

A. No, the tank—we were backing up.

Q. Well, I mean as it ran, that night?

A. He was riding on the front step of the engine, what we call the front end of the engine.

Q. Well, was that the front as it moved that night, or the real front which was behind you?

A. It would be the front end if you were going west, but when you are coming east it would be the back end.

Q. Well, was he on the rear of the engine, not as it ran, but as it stood still? Was he on the rear end of the engine?

A. If it stood still, no, he was on the head end of the engine if it stood still.

137 Q. Well, then, he was the last man to reach the place where Szary was run down, was he not?

A. No, sir, he was the first man to reach that.

Q. Well, he is in court, is he not?

A. Yes, sir.

Q. Now, the first thing that you know about this accident was when somebody told you it had happened, was it not?

A. Yes, sir.

Q. Who was the man that told you?

A. Why, Mr. Webb came running back to the engine, and I asked him what was the matter.

Q. Not anybody on the engine at all?

A. No, nobody on the engine.

Q. Neither the fireman nor the—who was the other, the brakeman?

A. The brakeman.

Q. Nor yourself; neither one of you three men knew a thing about this accident having happened, until somebody came and told you, is that right?

A. The brakeman knew it.

Q. What?

A. The brakeman knew it.

Q. And he was on the engine with you and didn't tell you?

A. Why, he was—after the accident happened he told me, after Mr. Webb told me. But he knew it first, he knew it before any of us, any of the firemen or I.

Q. But he said nothing about it to either one of you?

A. He didn't say nothing about it. He was up there, I guess, getting the man off the track, or helping to get him off, I don't know which.

Q. Anyhow, before this accident happened you were standing down near the coal pockets, or near the—where were you, you tell us?

A. Before the accident happened?

Q. Yes, before you started up before the accident?

A. Why, I was up at the water crane, taking water. Then I backed on down.

138 Q. Well, then you stayed there until—I think you said you were oiling or doing something to your engine?

A. Yes, I was oiling the engine around.

Q. In any event, you were standing still, were you not?

A. Yes, sir.

Q. Motionless?

A. Yes, sir.

Q. And did not intend to move until Webb came along and told you to hurry and get out of the way of some other engine, is that right?

A. That is what Mr. Webb told us.

Q. That is what I say; you were standing still and he came along, and he said, "Hurry up and get out of the way of the"—what was it, the Hackensack engine?

A. Yes, sir.

Q. "You have only got three minutes to do it." He told you that, too, didn't he?

A. He told me that the Hackensack engine had only three minutes to get back to the depot and leave on time.

Q. That meant you would have to get out of the way in three minutes, didn't it?

A. It meant for me to get out of his way right away.

Q. Yes, to hurry out of the way?

A. To leave there at once.

Q. Yes, and as soon as he told you that you did hurry as much as you could, did you not?

A. I didn't do any hurrying. I got up in the engine, and I—

Q. You did it at once, did you not, started at once?

A. I done as I was told.

Q. And so far as you were concerned, you knew nothing of this accident until you made the full trip that you had intended to make?

A. No, sir.

Q. That is right, is it not?

A. That is right. I didn't know anything about it.

Q. Now, do you say that you did ring the bell?

A. Yes, sir. Leaving the crane I pulled the bell, pulled the rope and rang the bell.

Q. Just as you left the water crane you pulled the bell?

A. Just as I left the water crane I rang the bell.

139 Q. In the management of that locomotive, as it was running that night, whose place was it, whose duty was it among you three men to ring that bell?

A. Why it was my duty, because the bell was on my side.

Q. Well, it was your duty only?

A. My duty only.

Q. Neither of the other men was in a position where he could ring the bell, even if he wanted to, is that right?

A. Yes.

Q. Is that right?

A. Yes.

Q. You were the only one that could sound the bell just before this accident, is that right?

A. I was the only one in a position to.

Q. And do you say you did ring the bell just before you started up, or as you started up?

A. Just as I got up, when I opened the throttle I blew three whistles and then I pulled the bell.

Q. Well, now, why did you blow the three whistles?

A. Why, it is a general occurrence around the coal pocket there; you generally sound three whistles before you leave there.

Q. Were you in court when Mr. Webb said that it was not usual to blow whistles around there?

A. What?

Q. Were you in court when Mr. Webb said that it was not a usual thing to blow whistles around that particular point?

A. I did not hear Mr. Webb say that.

Q. Were you here all day today and yesterday?

A. Yes, sir.

Q. Well, in any event, you say you did blow your whistle three times?

A. Yes, sir.

Q. Well, at that time you were perhaps two hundred feet from the place where you afterwards learned that this man was run over, were you not?

A. I don't know how many feet I was away.

Q. What?

A. I don't know how many feet I was away.

140 Q. Well, you know you were a good distance, don't you?

You can think back now, you remember where you started from and you know about where he was picked up, do you not?

A. Yes.

Q. And the distance between these two points is at least 200 feet, is it not?

A. Well, I don't know; I don't know what the distance is.

Q. Well, all you did in the way of whistling was to sound your whistle three times before you started up?

A. Yes, sir.

Q. And that is about the time you gave your bell a ring, too, isn't it?

A. Yes, sir.

Q. And then you went on until you finished your trip, that particular part of your trip, is that right?

A. Yes, sir.

Q. You knew, did you not, that men were likely to be crossing the track there at any time in connection with the ash pit, getting to and from the ash pit?

A. No, sir, I did not.

Q. You did not know anything about that?

A. No, sir.

Q. How long had you been working there?

A. Well, I have been working down there about eight years.

Q. Eight years?

A. Eight years this August.

Q. Around this sand house?

A. Well, I ain't around the sand house; I am out on the road most of the time.

Q. I am talking now about the locality?

A. I ain't been around the sand house no eight years; I ain't there continuously.

Q. What I am talking about, Mr. Bratton, is just the place where this man was run down, and just around that place. Do you know where that sand house is?

A. Yes, sir.

Q. Did you know where it was the night of this accident?

A. Yes, sir.

141 Q. And had you known before the night of the accident?

A. Yes, sir.

Q. Well, did you know the custom of the men working in the sand house, to carry their ashes out to the ash pit?

A. No, I never knew they carried ashes out to the ash pit.

Q. You never saw them throw their ashes in there?

A. No, sir.

Q. How long had you been engineering that night?

A. Since I went to work at six o'clock that night.

Q. I mean, how many nights before that had you been an engineer?

A. Well, they used me on and off on a switch engine.

Q. I cannot hear you.

A. They used me off and on running a switch engine.

Q. Were you an engineer at all that night, a regular engineer?

A. Well, I was not promoted.

Q. What?

A. I was not promoted.

Q. Then you were not a regular that night, were you?

A. No, sir, I was used as an emergency engineer.

Q. Only an emergency engineer. That meant you attempted to run an engine when there was no real engineer there to do it, is that right?

Mr. von Bernuth: I object to the form of the question.

Q. I mean no regular engineer?

Mr. von Bernuth: I object to the form of the question, calling for a conclusion of the witness, "Attempted to run an engine."

Objection overruled. Exception to defendant.

Q. I say that you were not a regular engineer at all, the night of this accident, were you?

A. I was not promoted.

142 Q. What?

A. I was not promoted as an engineer.

Q. Were you an engineer, or were you not; that is what I want to know?

A. Well, I was running an engine.

Q. Yes, we all know that, but you were not an engineer?

A. I was emergency engineer.

Q. You never had had a regular engine of your own, had you?

A. No, sir, only——

Q. And what were you doing besides running an engine at that time? What was your regular work?

A. My regular job was firing.

Q. Firing?

A. Yes, sir.

Q. On this very engine that ran down Szary?

A. No.

Q. What was the emergency that night that caused you to stop firing and go and run an engine?

A. They did not have no regular engineers on the list, as far as I know.

Q. Who was the regular engineer of 104; did it have one?

A. Yes, there was a regular engineer, I think.

Q. What was his name?

A. I think his name was—he did have the job regular, I am not sure if he had it when I got the job; I don't know if he got another job, and this job that I was working on was taken. The engineer that was running the engine before me, I think his name was Niles; he had that job steady, but I don't know that he was laying off on his own accord, or if he got another job; and that left the job vacant. I don't know that.

Q. You know he was not around this night, anyhow?

A. No, he was not.

Q. And it was because he was not around that you were placed in charge, by somebody, of this engine that ran down Szary; is that right?

A. Yes, sir.

Q. That is right, is it?

A. Yes, sir.

Q. What is the next grade from firing, above firing?

A. What is the next grade?

143 Q. On a locomotive?

A. What is the next grade?

Q. Yes.

A. I don't know what you mean by next grade.

Q. Is a man promoted or is he advanced from the position of fireman, right to engineer?

A. Yes, sir.

Q. How long after the night of this accident were you made an engineer?

A. How long afterwards was I made an engineer?

Q. About?

A. I wasn't made an engineer yet.

Q. Have you been made an engineer yet?

A. No, sir.

Q. Oh, you are not even an engineer today, then, are you?

A. They only use me in emergency cases, running an engine.

Q. When they have nobody else, is that right?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. What are you, still a fireman?

A. Yes, sir.

Q. How old are you?

A. I was thirty the 3rd of March.

Redirect examination.

By Mr. von Bernuth:

Q. Nothing unusual in your doing this work as an emergency engineer, was there?

A. Sir?

Q. Nothing unusual in your doing this work as an emergency engineer, was there?

Mr. Robinson: I think that calls for a conclusion.

The Court: The jury know that, Mr. von Bernuth.

Mr. von Bernuth: I do not know whether they do or not.

By the Court:

Q. Was this unusual work for you, to be an engineer?

144 A. No, it was not unusual; they used me right along.

By Mr. von Bernuth:

Q. And did they, both before and since this accident?

A. Yes, sir.

Q. I mean by that the railroad company. And they also do the same thing with other firemen who have been in the employ some time?

Mr. Robinson: I object to that, may it please your Honor, as irrelevant and immaterial. I do not believe whether they do or not makes any difference.

Objection sustained. Exception to the defendant.

Recross-examination.

By Mr. Robinson:

Q. Was that the first trip you made that night, Mr. Bratton?

A. What do you mean, was that the first time I ever run an engine?

Q. No, I did not ask you that then. I said, was that the first trip you made as an engineer that night?

A. You don't make any trips on switching.

Q. I mean, was that the first run you made that night?

A. The first run I——

Q. The run on which this man was run down, this man Szary; was that the first run you made with this engine that night?

A. I don't understand what you mean by the first run.

Q. You were running the engine when the man was hurt?

A. Yes, sir, I was running the engine.

Q. You are the man that ran over Szary, are you not?

A. Yes, sir.

Q. Was that the first run you made that night?

A. Well, I run it as far as Grove Street, and backed down to get where I was.

145 Q. Well, was that complete movement, up to Grove Street and back to where you were, were those the only movements you had made of an engine that night?

A. Oh, no, I was switching over around the yard with that engine.

Q. Had you done any firing that night?

A. No, sir.

Q. Your regular duty, even yet, is only firing, is it?

A. Yes, sir.

Redirect examination.

By Mr. von Bernuth:

Q. How long have you been a fireman?

A. Why, I will be eight years the 13th or 14th of August.

Q. And was it part of your duty as a fireman to learn how to run an engine?

A. Sir?

Q. Was it part of your duties as a fireman to learn how to run an engine?

A. You can pick it up firing, if you watch the engineer.

Q. And then the firemen are promoted from firemen to be engineers, after they have learned how?

A. Yes, sir.

Mr. Robinson: And you have not been promoted yet, have you?

The Witness: No, sir.

Q. Now, the headlights that you had on the rear and front ends of the engine that night, were they the usual headlight?

A. Yes, sir.

Q. And was it customary, or was it not customary to have any other headlight on switch engines, no matter what the weather was?

A. No matter what.

Q. No matter what the weather was?

A. No.

Q. The headlights that you were using that night were built how? Was there a reflector?

A. There was a reflector in the back of them, in the headlight case.

146 Q. Back of the headlight?

A. Yes, in the case.

Q. And how wide is the reflector?

A. I could not tell you that.

Q. Well, about?

A. I don't know how big around they are.

Q. Well, was it one foot, or eighteen inches, or what?

A. I don't really know.

Q. Where were you when you first knew that an accident had happened?

A. I was up in the cab of the engine.

Q. I know, but where was the engine in the yard when you first knew that an accident had happened?

A. Why, down east of the sand house.

Q. Right at the switch that goes back to the ash pits?

A. Yes, sir.

Q. Now, to get over from the coal pit track over to the ash pit, you had to cross two switches?

A. Yes, sir.

Q. Just before you came to a stop and started to go west again?

A. Yes, sir.

Q. And you came to a dead stop just east of the second switch?

A. Yes, sir.

Q. Do you know whether or not the lights on the ash pit were lighted?

A. Yes, the lights were lighted on the ash pit.

Q. I mean the lights up on the pole?

A. Yes.

HENRY YOUNG, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. von Bernuth:

Q. What is your business, Mr. Young?

A. Why, stenographer in the City Clerk's office, Jersey City.

Q. And were you in that same occupation last year?

A. No, I was not. That is at the time this testimony was
147 taken I was not. But I was appointed there by the City
Commission of Jersey City.

Q. Were you a stenographer in April, 1917?

A. I was.

Q. What was your business in April, 1917?

The Court: Well, he was a stenographer. Did you take these
notes?

The Witness: Taking stenographic notes for various law firms in
Jersey City.

Q. Did you, in or about the month of April, 1917, take steno-
graphic notes of an examination of the plaintiff in this action,
Antoni Szary?

A. I did.

Q. And what was the date of that examination?

A. Well, it appears that it was on the 10th of April, 1917.

Q. And where was it held?

A. On Pavonia Avenue.

Q. At the residence of Mr. Szary?

A. At the residence of Mr. Szary.

Q. And in that examination did you correctly take notes of what
questions counsel asked?

A. I did.

Q. Both for Szary and for the railroad company?

A. Both for and against.

Q. By the way, the examination was conducted through an in-
terpreter, was it not?

A. Yes, through an interpreter. Mr. Lewicki was the interpreter.

Q. And after the questions were asked by the counsel, Mr. Lewicki
interpreted them to Mr. Szary?

A. Yes.

Q. And Mr. Szary answered the interpreter, who, in turn trans-
lated the answers to you?

A. He did.

Mr. Robinson: I am willing to admit that this young gentle-
man took down what he heard there, at that time.

Mr. von Bernuth: Will you admit the authenticity of the
148 minutes?

Mr. Robinson: That is all I admit, that he took down what
he heard there, that this is a correct transcript of what was said there.
There is no imputation against this young man, of course.

Mr. von Bernuth: Will you concede that my copy is the evi-
dence?

Mr. Robinson: I will concede just what I say, that this young
man took down what he heard said at this examination by the dif-
ferent people engaged in it.

Q. I show you a copy purporting to be a report of the examina-

tion before trial, which has been referred to, and I ask you if that is a transcript which you prepared from your notes?

A. Yes, sir, it is.

Q. And I call your particular attention —

Mr. Robinson: Now, another thing, Mr. von Bernuth, that I was going to suggest. I am perfectly willing that the whole of this examination may be considered as being in evidence.

Mr. von Bernuth: I do not think it is necessary.

Mr. Robinson: I think the jury, if they hear any of it, ought to hear all of it.

Mr. von Bernuth: I do not think it is necessary. There are some questions there which are incompetent and irrelevant and not proper, they have been ruled out in this trial and should not be allowed in. This is an examination before trial; the latitude allowed counsel is much greater than in the trial itself.

The Court: If you object, it cannot go in.

Mr. von Bernuth: I do.

Mr. Robinson: I made the offer anyhow, as far as my case goes.

149 The Court: You want to put in certain questions and answers?

Mr. von Bernuth: I want to put in a few questions.

The Court: Put them right in, read them into the record. Read in what you want.

Mr. von Bernuth: Page 17. I offer in evidence the following question and answer: "Q. Did this engine hit you in the back? A. Yes."

Mr. Robinson: Well, now, wait. Go slowly, because I want to read the questions and answers that will explain these things. Go on.

The Court: It did hit him in the back, did it not? Is there any contradiction there?

Mr. von Bernuth: He said it hit him in the back and the arm. I am just reading the questions he said he did not remember or denied being correct.

Mr. Robinson: The trouble is, your Honor, there was an effort on the part of the examiner who took this testimony, to force, I might say, upon the plaintiff an admission that he was walking along the track, and that he was run down from behind; and a great many questions—no answers, but a great many questions suggest that. That is the reason I thought it would be only fair to the plaintiff and fair to the jury to let them hear the whole of this examination. Now, that is objected to, so I will have to do the best I can, by following him up and correcting where I am able to do so quickly enough, to correct any false impression that would be given by those questions and answers that he is going to read, standing alone.

The Court: Go on and read what you want.

Mr. von Bernuth: I am simply reading the questions which I asked him yesterday about.

150 The Court: And which you think contradict him.

Mr. von Bernuth: The questions which I asked him yesterday about, that is all. I am not going into impressions, or anything

else. "Q. Did you look behind to see if any engine was coming? A. No. When I started to walk I did not see anything, and it hit me and knocked me down and cut my leg off." I offer in evidence that question and answer. I offer in evidence the following question and answer: "Q. After you left the engine room and started to walk, after that did you look behind you to see whether an engine was coming? A. When I walked out of the engine room I looked around down there, did not see any engines come. Only I saw one come from the pit towards me and I started to walk. I did not look around any more." I also offer in evidence the next question and answer: "Q. So you did not look back of you as you walked along the track? A. No, then I did not look any more." All of which questions Mr. Szary yesterday denied having answered, as set forth in the minutes of that hearing.

Mr. von Bernuth: Your Honor, I will now read the deposition of Joseph F. McCarthy.

Mr. Robinson: I would like to have it appear, too, before this deposition is read, that the plaintiff was not represented at this examination.

Mr. von Bernuth: I will read the whole thing, so it will appear.

Mr. Robinson: Well, let that be part of the record, that the plaintiff was not represented on this examination. This is an examination taken by the counsel for the railroad company, without plaintiff's lawyer being present.

151 The Court: What was the matter with the plaintiff's lawyer?

Mr. von Bernuth: I will have it appear that the plaintiff received due notice that the deposition was going to be taken under the rule.

Mr. Robinson: Surely, it was taken down south, and it was not very convenient for the plaintiff to attend down there.

Mr. von Bernuth: I know.

The Court: What was the trouble with the plaintiff's lawyer?

Mr. von Bernuth: I offer in evidence the original notice served on the attorney for the plaintiff on January 11, 1918, which I have had taken from the records of the court.

Mr. Robinson: It did not amount to anything anyhow.

Marked Defendant's Exhibit F.

The Court: Now read the deposition.

Mr. von Bernuth: The notice is entitled with the name of the case. (Reads Defendant's Exhibit F.)

(Mr. von Bernuth then read the deposition of Joseph F. McCarthy, as follows):

"Examination of witness Joseph F. McCarthy, a witness called on behalf of the defendant, Erie Railroad Company, taken at Camp McClellan, Alabama, on Thursday, January 17th, 1918, pursuant to a notice duly served on the attorney for the plaintiff under Section 863 of the Revised Statutes of the United States. The deposition being taken at Headquarters Division Stockade, Twenty-

ninth National Guard Division, having been transferred there from Company Headquarters, Company A 104th New Jersey Engineers, the witness being under military detention and it being impossible to have him produced at the place noticed in the notice to take deposition:

"No one appeared for the plaintiff.

"Coulter D. Young, Esq., appeared as attorney for the defendant.

"JOSEPH F. McCARTHY, being duly sworn and cautioned, was examined and testified as follows:

"By Mr. Coulter D. Young:

"Q. What is your name and address?

"A. Joseph F. McCarthy; Camp McClellan, Alabama, Divisional Stockade.

"Q. What was your former address?

"A. 211 Erie Street, Jersey City, N. J.

"Q. Were you employed by the Erie Railroad on January 5th, 1917?

"A. Yes, sir.

"Q. What was your position with the Erie Railroad in January, 1917?

"A. Fireman.

"Q. Do you remember the accident to Toni Szary, on January 5th, 1917?

"A. I didn't see it, but I remember it.

"Q. What time did the accident occur?

"A. Between 8:45 and 9.

"Q. At night?

"A. Yes, sir.

"Q. What were the weather conditions that night?

"A. Why, it was rainy and smoky and foggy around the coal pockets there.

"Q. What was the number of the engine you were on?

"A. 104.

"Q. That was a yard engine, was it not?

"A. Yes, sir.

"Q. Just prior to the accident where was your engine?

"A. We were getting water.

"Q. You were getting this water from——

"A. The water tank.

153 "Q. This water tank is at the west end of the coal pockets, is it not?

"A. Yes, sir.

"Q. What direction did you move from the water tank?

"A. East.

"Q. That is towards Jersey City?

"A. Yes, sir.

"Q. When the engine started to back up what, if any, signals were given?

"A. The engineer blew a whistle and rang a bell; the bell kept ringing until we backed all the way up.

"Q. How many blasts of the whistle were blown?

"A. Three.

"Q. The bell was ringing continuously until after the accident?

"A. Yes, sir.

"Q. What, if any, lights were on the engine?

"A. There were two headlights, one on the front and one on the back.

"Q. This light on the back was on the tank, wasn't it?

"A. Yes, on the back of the water tank.

"Q. When you started to back which direction was the engine facing?

"A. It was facing toward the west; we backed toward the east and the engine was faced toward the west.

"Q. When you started to back down to the east at what speed was your locomotive moving?

"A. Between four and five miles an hour.

"Q. I believe you said you were a fireman on this engine at the time of the accident?

"A. Yes, sir.

"Q. Did you see the accident happen?

"A. No, sir.

"Q. What was the first you knew of the accident?

"A. We had already backed up and were awaiting for the brakeman to throw the switch, and Tom Webb, the engine dispatcher, came up and told us we had killed a man.

"Q. Who is Tom Webb?

"A. The engine dispatcher.

154 "Q. So that you saw nothing of the accident?

"A. No, sir. I saw him laying there after it was done.

"Q. Was your engine stopped at the time Webb informed you that a man had been hit by it?

"A. Yes, sir.

"Q. Why had you stopped the engine?

"A. To wait for the brakeman to throw the switch, to come up on the ash pit track.

"Q. At the time of the accident your engine was on the coal pocket track, was it not?

"A. Yes, sir.

"Q. About where were you standing when the engine started to back away from the water tank?

"A. I was standing between the engine and the water tank.

"Q. What direction were you looking?

"A. I was looking east.

"Q. But you saw no one on the track?

"A. No, sir.

"Q. From the time you started to back away from the water tank to the time you were informed by Webb that you had struck a man, did your engine bump into any other engine or cars?

"A. No, sir; the track was clear except for the Hackensack engine in front of us.

"Q. That is, to the west of you?

"A. To the west.

"Q. From the time you started to back away from the water tank to the time you were informed by Webb you had struck a man was your engine bumped into by any other engine or cars?

"A. No, sir; we cleared the switch and stopped there.

"Q. Who was the engineer on engine 104?

"A. William Bratton.

(Signed)

"JOSEPH F. MCCARTHY."

155 Mr. von Bernuth: I will now read in evidence the deposition of Russell P. Brown, who was also examined before trial by Mr. Robinson and myself, he being in the navy (reading):

"RUSSELL P. BROWN, a witness on behalf of the defendant:

"Direct examination.

"By Mr. von Bernuth:

"Q. Mr. Brown, where do you live?

"A. Paterson, Robert Street.

"By Mr. Robinson:

"Q. What is the full name, Mr. Brown?

"A. 31 Robert Street, Paterson.

"By Mr. von Bernuth:

"Q. Are you now in the employ of the Erie Railroad Company?

"A. No.

"Q. Were you in the employ of the Erie Railroad Company on January 5, 1917?

"A. Yes, sir.

"Q. And what was your position at that time?

"A. Conductor of a way freight—engine 104.

"Q. Was 104 what is known as a switch engine—yard engine?

"A. Its work consisted of moving cars around in the yards at Jersey City.

"Q. And through the tunnel?

"A. Yes, tunnel going out of the yard at Croxton.

"Q. That is also a freight yard?

"A. Yes, sir, all yards this side of the bridge.

"Q. Were you the conductor of yard engine 104 on the night of January 5, 1917?

"A. Yes, sir.

"Q. Do you remember that engine going to the water crane for water on that night?

"A. Yes, sir.

"Q. Did your engine go to the water crane that night more than once?

"A. No, sir."

156 "Q. Where were you at the time the engine was at the water crane?

"A. About five car lengths south of the water crane—five or six cars.

"Q. And the water crane was located at the west end of the coal pockets?

"A. Yes, sir.

"Q. And you were south of the coal pockets?

"A. Yes, sir; that is north on Pavonia Avenue—at the oil house.

"Q. And how far is a car length?

"A. They run from 36 to 40 feet—about six good forty-foot cars give the distance.

"Q. Now, what first attracted your attention as to your engine being at the water crane?

"A. I was waiting for them to take water to notify the switch tender at 9th Street and I heard the bell ringing and the whistle blowing.

"Q. How did you know that the bell was ringing and whistle blowing?

"A. Because I could tell them on my engine.

"Q. Did you hear the bell and whistle?

"A. Yes, sir.

"Q. You could not make out what kind of engine—was it a bobtail?

"A. Yes, a bobtail.

"Q. How could you tell?

"A. On account of headlights on both ends.

"Q. Did you see the lights?

"A. Yes, you could see the lights, the reflection of the lights.

"Q. What kind of a night was it?

"A. Misty night and smoke blowing.

"Q. What is a bobtail engine?

"A. A bobtail engine is an engine used for switching and has steps at each end.

"Q. And there are steps at the head of the engine and also at the rear of the tank?

"A. Yes, sir.

"Q. And the tank is also called a tender?

"A. Yes, sir.

157 "Q. Now, did you recognize the whistle and the bell on this engine?

"A. Yes. I worked on this engine for a year and a half and I was waiting for the engine to report at 9th Street. I worked on it a year and a half and I can recognize a bell the same as you can foot-steps if you know them.

"Q. Did you see the engine go east from the water crane?

"A. Yes, sir.

"Q. What did you next know about your engine?

"A. I went and reported the engine coming down as I heard him blow and I heard it moving and I walked down to the crossing—Pavonia Avenue, to protect the crossing.

"Q. The crossing that you speak of is further south than where you heard the engine?

"A. Yes, sir.

"Q. About how much further south?

"A. About ten car lengths.

"Q. That would be about 400 feet?

"A. Yes, sir.

"Q. The crossing you were speaking of is where the tracks of the railroad company cross Pavonia Avenue?

"A. Yes, sir.

"Q. The tracks after they pass Pavonia Avenue go into what you call the south side?

"A. Yes, south side yard, also known as local yard.

"Q. When did you next see your engine?

"A. The engine was so long coming I walked back to about 9th Street and as the engine came along I got on step.

"Q. Well, when did you first hear about the accident?

"A. As I got on step of engine they reported to me about accident.

"Q. And that is the first you knew of the accident?

"A. Yes, sir.

"Q. You didn't know anything about it yourself?

"A. No, sir.

"Q. How was the engine headed when you saw it at the water crane?

"A. The engine was headed west.

"Q. Could you see the lights?

"A. The hind light was low and the other was high.

158 "Q. And to go down from the crane toward the sand house it would be running backwards?

"A. Yes, it would be going east. Yes, we had to come to 9th Street; on account of the Hackensack train—we had to go around there.

"Q. Then the engine was going to switch down to the tracks that run into the local yard?

"A. Yes, I was acting as a flagman.

"Q. And what you were doing at the time was keeping the track clear that leads into the south side yard or local yard so that your engine could go into it?

"A. Yes, sir."

(Mr. Robinson then read the cross-examination as follows:)

"Cross-examination.

"By Mr. Robinson:

"Q. Was it stormy?

"A. Drizzle, one of the drizzly nights.

"Q. And was it pretty dark in the yard, generally?

"A. Well, the lights were dim on account of the drizzle, the smoke was blowing.

"Q. Was it the kind of a night the lights did not show very clear?

"A. Well, you could see the lights, the illumination from the lights.

"Q. Well, it wasn't what you railroad men call a bad night?

"A. No, a stormy night.

"Q. And you say the yard was pretty well filled with smoke?

"A. Yes, the smoke lays low.

"Q. Were there many engines laying around the place?

"A. Not many engines, couldn't move many engines—there are only three tracks in that local yard.

"Q. Well, there were more than three engines?

"A. Might have been.

"Q. I do not mean this particular place—say a radius of about 100 feet?

"A. No, the only engines I knew of that would be moving would be the Hackensack engine.

"Q. There were several on the switch?

"A. The only one I had seen while I was there was the Hackensack engine.

"Q. Well, there was at least this Hackensack engine?

"A. Yes, that was moving around—that was backing down.

"Q. Ringing its bell at times I suppose, and generally some other engine moving around at that time?

"A. Yes.

"Q. And there were a good many engines moving at the time?

"A. Yes, sir.

"Q. And every engine that was moving around at some time likely at least to ring its bell or blow its whistle?

"A. Yes, at some times they do. They don't blow the whistles or ring the bells unless they are ready to move—don't blow them all the time.

"Q. Well, as you state, before this accident happened you heard a great many—more than one bell ringing?

"A. Yes.

"Q. Wherever you were that night, that is the night of the accident, you could distinctly hear a number of engines ring their bells?

"A. No, sir, if there had been any others ringing I could have heard the number of them but there were only two of them there.

"Q. What do you mean by 'there'?

"A. Well, within hearing distance.

"Q. There were engines moving around there within a short distance for you to hear the bells?

"A. The only things you could hear would be a bell.

"Q. About how far would the sound of an engine bell carry that night in the yard under the conditions that existed with the fog, smoke and rain?

"A. Well, that is a question. I have heard engine bells ringing so that you could hear them fifteen car lengths, that is when it is quiet and again you could not hear them seven or eight.

"Q. One would sound clear and loud—the sound does not travel as far on stormy nights I suppose?

"A. This one had a good clear ring to it.

"Q. What was this Hackensack engine doing, was it moving around?

"A. Backing down to the water crane.

"Q. Ringing its bell too?

"A. Yes.

"Q. And you say your engine had rung its bell?

"A. Yes, rung its bell before it started; rung its bell and blew its whistle—that is how I knew it was our engine.

"Q. You could see them switching it and could see it was a bob-tail?

"A. Yes.

"Q. How far away was it?

"A. Was about five or six car lengths.

"Q. It came back toward you?

"A. Going in toward pit, I was south of the pocket.

"Q. The engine was running east?

"A. Yes, backing east.

"Q. And you were west of the point from where it started?

"A. I was southwest of the engine.

"Q. Where were you when the engine started, further west than where the engine was?

"A. South of the engine.

"Q. And on a line with the engine?

"A. Yes.

"Q. The engine went further east when it started?

"A. Yes, went further east toward the coal pocket.

"Q. Then you were not protecting the tracks; there was no one protecting them?

"A. The engine bell and whistle protected that.

"Q. There was no one protecting them?

"A. The engine bell and whistle.

"Q. There was nobody protecting the track?

"A. The engineer, yes.

161 "Mr. Robinson: Will you answer my questions, Mr. Brown, yes or no?

"The Witness: I have answered your question seven times.

"Q. You were protecting some other track by being on it with a lantern?

"A. I was protecting the crossing—I am answering your question now—I was protecting the crossing.

"Q. Well, there was nobody on the track protecting the track in the sense that there was nobody watching this backing engine?

"A. Don't need them in the yard—don't need anybody.

"Q. There was only one man protecting the track; that was the engineer when he blew the whistle?

"A. Didn't need anyone.

"Mr. Robinson: Will you answer, Mr. Brown, where you can, yes or no.

"Q. What I want to know is this, was there any man that you know of on the track ahead of this backing engine as it moved towards the place where it struck this Szary down?

"A. There was nobody on the track.

"Q. Now, who told you about the accident?

"A. The brakeman told me; he reported the accident to me.

"Q. Do you know what moved—whether it was the tender and locomotive, or locomotive alone?

"A. No, sir; they both move together.

"Q. Well then he was run down by the tender?

"A. Yes, sir; that is what the brakeman told me.

"Q. Then, what ran Szary down was really one end of the tender which was being pushed by the rear of the engine, in other words, the tender and the engine were running backwards?

"A. Yes, sir.

"Q. Well, do you know, Mr. Brown, whether there was any light on the forward end of the tender as it was pushed?

162 "A. The light on the hind end you mean, yes.

"Q. There was a light?

"A. There was a light here and a light here on the engine (indicating), and there was a big headlight here.

"Q. How do you know that?

"A. Because we always light them at night after sundown. I got on and off the back of that engine I could not count the number of times that same night.

"Q. Well, you did not see this accident, did you?

"A. No, sir.

"Q. You did not see the tender and locomotive start up before the accident?

"A. I saw the headlight on the end of the locomotive as I stood there.

"Q. Before the accident?

"A. Yes, before the accident.

"Q. What was the first you knew of the accident?

"A. By boarding the engine and the brakeman reporting the accident to me.

"Q. You did not hear any cry?

"A. No, sir; I was too far away.

"Q. About how far were you away from the place where Szary was run down?

"A. About fifteen car lengths from where he was run down—about five cars.

"Q. From the water crane?

"A. Yes, about five car lengths from the water crane."

Mr. Robinson: I am reading it, gentlemen, just as it is here (resuming reading):

"Q. You were south of the water crane?

"A. Yes.

"Q. That would bring you south of the place where the accident happened?

"A. Yes, sir.

"Q. Was there anything else on the track where the accident happened?

"A. No, sir.

"Q. Any engines, locomotives, rolling stock, etc.?

"A. No, sir.

163 "Q. Did you know this man Szary?

"A. No, sir.

"Q. Not even by sight?

"A. No, sir.

"Q. Did you see him that night at all?

"A. No, sir.

"Q. Then the first you knew of the accident was simply by being told that it had happened?

"A. Yes, sir.

"Q. By the brakeman?

"A. Yes, brakeman.

"Q. Brakeman on your train?

"A. Yes.

"Q. Did you go then to look at the place where the accident happened?

"A. No, sir.

"Q. Did you go to look at the man?

"A. He had gone—been taken right to the hospital.

"Q. He had been taken to the hospital before you heard of the accident?

"A. Yes, sir.

"Q. Was it your duty to make a report of that accident?

"A. Yes, sir.

"Q. Did you make a report of it?

"A. Yes, sir.

"Q. Have you read it over lately?

"A. Yes, I looked at it to get the man's name.

"Q. Have you it in your pocket, or a copy of it?

"A. No, sir.

"Q. When did you see it last?

"A. Some time ago, I even forgot his name.

"Q. You say this engine was a yard engine, a switch engine?

"A. Yes.

"Q. Just what do you mean by it being a switch engine?

"A. Making up trains and taking them to Bergen, another yard the other side of the tunnel.

"Q. That would be west; went beyond Bergen wouldn't it?

"A. Yes, sir.

"Q. What is the terminal of the Erie, the terminal of its own system?

"A. What do you mean?

"Q. The end—does the Erie have railroad tracks to Buffalo?

"A. Yes, to Buffalo direct, but these cars were not through cars—merely local cars.

161 "Q. You were there to handle through cars that were going to Buffalo, or cars that were going to Chicago, say?

"A. Yes.

"Q. San Francisco, I suppose some of them?

"A. Yes, some of them.

"Q. What were you doing this particular night, were you coaling up before this accident?

"A. Getting water from the crane.

"Q. Were you finishing that night's work?

"A. No, sir, had been working about 2 1/2 or 3 hours only.

"Q. How far west do some of your cars go?

"A. Some to Chicago, Buffalo, all over.

"Q. And what brought you to the water tank to get some water was to continue the work that night?

"A. Yes, sir.

"Q. You boil up the water?

"A. Yes, boil it up to steam. We finished that up and had about four or five hours more of steady work and had to get that much more water to keep on the move until morning.

"Q. Was it all western work you were handling that night?

"A. Yes, sir.

"Q. All cars going beyond Jersey?

"A. Yes.

"Q. And you had made this trip to the water crane so that you could continue this work on trains going beyond Buffalo, some to Chicago, possibly?

"A. Yes, sir.

"Q. At the time of the accident you had filled the tank with water and were on your way to get some cars?

"A. Yes, sir.

"Q. Now, do you know the place where Szary was, the man who lost his leg?

"A. Yes, sir.

"Q. What do they call it, the sand house?

"A. Yes; I know where it was.

"Q. And you made frequent trips to it?

"A. No, the hobtails go to the south side of the coal pocket to get sand.

165 "Q. Sand is something used in railroading, just as water, I suppose; what was the actual use of it?

"A. Put it on the rails to keep the engine from slipping.

"Q. Was any of it used in the engine itself—or on any part of the engine structure?

"A. No, sir.

"Q. Was it carried on the engine?

"A. Some on top of the boiler.

"Q. How is it used—is it automatic?

"A. It drops down through an air pipe, goes right down (indicating).

"Q. This sand that you use in railroading was carried in quantities on the engine—on top of the boiler, and carried in such a way that it went down to the track rails, is that so?

"A. Yes, sir.

"Q. It is a necessary part of the equipment of a locomotive, is that right?

"A. Yes, sir.

"Q. Did you know the sand house in which this man Szary worked?

"A. Well, I know the place, yes.

"Q. The sand was prepared in that house—or some sand?

"A. Yes, the sand was prepared in the house by heat to dry it, that is the way they do it.

"Q. That was Szary's job?

"A. Yes, sir.

"Q. Drying sand to feed to these engines to be used while they were being operated, is that right?

"A. Yes.

"Q. Do you know the particular work he did; how the sand was prepared?

"A. No, sir; I know how it is prepared, but I don't know just what he did.

"Q. He was engaged in some preparation of the sand?

"A. Yes, so the yard people told me; I don't know that.

"Q. Well, that sand, I suppose, was fed by Szary and the sandmen to all engines, in some way or other, wasn't it?

"A. Not all the engines, only the ones that needed it; not all of them.

"Q. Well, don't they all need sand at times?

"A. Yes, at times all of them need it.

"Q. It was just as necessary to have it in the engine as to have water in your boiler, wasn't it?

"A. Yes, sir.

"Q. And you would not think of starting on a trip without your sand boxes filled, would you?

"A. It might be a bum job if we did.

"Q. Do you know how much of a run this engine made from the time it began to back until the time it struck this man, Szary?

"A. No, sir.

"Q. Could you give us some estimate at all, not exact, but you were the conductor and made some sort of an investigation, did you not, that night, as to how the accident happened?

"A. Yes; I made an investigation and the brakeman who was there when the accident happened, he told me.

"Q. Do you know the exact spot where the accident happened?

"A. I don't, because it has been so long I have forgotten it.

"Q. Well, about how much of a trip did the engine have from the place where it started up before the accident to the place where it would get another one of these cars. Do you know what I mean?

"A. No; I don't.

"Q. You say he started up from the water crane and he was back-

ing to get some more of these cars to start them on their way west?

"A. Yes; the idea was that he had to back down to the water crane and get his water, and then they let another engine in and he had to go by the place where Szary worked, and back over on the other track.

"Q. Well, wherever he was going he had to make the trip backwards when he was passing this sand house where Szary was?

"A. Yes, sir.

"Q. Was it near the sand house where Szary was knocked down?

"A. Yes—it is almost one building.

"Q. Then Szary was knocked down by the place where he had his work to do?

"A. Yes, sir.

167 "Q. About what time of day was it?

"A. About nine o'clock.

"Q. At night?

"A. Yes, sir.

"Q. Do you know whether it was raining or storming at the time?

"A. Yes, sir drizzling.

"Q. This drizzle was fine?

"A. Yes.

"Q. Who were on the engine at the time this man Szary was run down?

"A. One brakeman, engineer and fireman.

"Q. What was the brakeman doing?

"A. Piloting the engine for water; taking it for water.

"Q. What was the engineer's name?

"A. I cannot think of his name.

"Q. You cannot think of his name?

"A. No, sir; I would know it if I heard it.

"Q. Well, never mind; can you think of the fireman's name?

"A. No, sir; McCarthy, or something like that.

"Q. Can you think of the brakeman's name?

"A. I have thought of it three or four times, but forget them all; the names, I forget them.

"Q. If you could give us some idea of the distance that this engine had to run from the time it started up on its trip and hit this man, to the place where it was intended to be stopped, I would like to have you do so. You understand what I mean, don't you?

"A. Yes.

"Q. What was the distance from the place where the locomotive started to back to the switch that it wanted to back before it returned—by the hundreds of feet, if you could give us that?

"A. Yes, more than that, about thirty car lengths.

"Q. Thirty car lengths—that would be at least 1,200 feet?

"A. Yes, easily, from the time we ran from the water crane until we got to the switch and ran back from the water crane until it crossed the switch.

"Q. Now, the trip he wanted to make before he reversed
168 and ran back from the crane from where he started was about 1,200 feet?

"A. Yes, something like that, might be a little less or a little more.

"Q. Well, do you know how near he was to the switch point to which he was backing when he ran down Szary?

"A. No, sir.

"Q. You have not the slightest idea how many feet the locomotive had been run before the accident, have you?

"A. No, sir.

"Q. Except that you do know that the accident did happen directly in front of the building in which Szary did his work with the sand?

"A. Well, as the brakeman explained to me, about opposite the sand house.

"Q. Well, I will say about opposite the sand house where Szary was employed?

"A. Yes, sir.

"Q. Do you know what was the first car which you picked up after this accident; what its destination was?

"A. No, sir.

"Q. Are those cars marked? Can you tell by looking at a freight car where it is going?

"A. Well, if I am accustomed to where they are going; they are all marked with tags.

"Q. Well, on this particular trip you were after some cars you knew went beyond the State of New Jersey?

"A. Yes, sir.

"Q. Do you know whether the first car which you picked up after the accident was to go beyond the State of New Jersey; do you know that?

"A. No, sir.

"Q. For all you know it may have been destined for some place further west, a good deal further than the most western part of New Jersey?

"A. Yes, sir.

"Q. You were making up one separate train at the time of the accident?

"A. I was getting cars for my own train in the morning.

"Q. What train was that?

"A. The way-freight train, to go to Bergen.

169 "Q. You would handle cars that went on perhaps to Chicago, and you were handling them that night both before the accident and after it?

"A. Yes, sir.

"Q. When did you leave the service of the company, Mr. Brown?

"A. About six months ago.

"Q. Left to join the navy?

"A. No; left that company and went to another.

"Q. Another railroad company?

"A. Yes, sir.

"Q. What company?

"A. Delaware, Lackawanna.

"Q. Then you left that to go into the service?

"A. Yes; go to work for Uncle.

"Q. How long had it been raining before this accident—about?

"A. I think it was drizzling when I went to work. That is the best I can tell you about that.

"Q. Do you know how long it continued to storm after the accident?

"A. No.

"Q. Is that what you would call, as a railroad man, a bad night in the yard?

"A. No; it was not a real bad night; it was a fair night to a stormy night—was not a bad rain or a heavy rain.

"Q. I do not mean on account of the rain so much; I mean on account of the smoke and steam?

"A. Well, at one particular point it was a bad night.

"Q. Well, on such a night the steam and smoke hovers low to the ground; makes it difficult to see any distance—didn't it?

"A. Yes, such a night as that."

(Mr. von Bernuth then read the re-direct examination as follows:)

"Redirect examination.

"By Mr. von Bernuth:

"Q. What time did you go to work that night?

"A. Six o'clock.

"Q. This accident happened about nine?

"A. Yes, or shortly after.

170 "Q. At the time you saw the engine, when you heard the engine whistle and the bell ringing, was the engine clear of the coal pockets?

"A. It was clear of the coal pockets.

"Q. It was opposite the water crane and the water crane is what you describe as the water tank?

"A. Water crane is a big tank to water our engines with.

"Q. Is it up high?

"A. Yes.

"Q. And what was underneath the tank?

"A. Open framework.

"Q. Did I understand you to say that the coal pockets were between you and the water crane?

"A. No.

"Q. Where the accident happened, I am talking about?

"A. The coal pocket was between me and where the accident happened.

"Q. The coal pockets was what kind of a building?

"A. Big wooden structure with open framework underneath it.

"Q. Do you know anything about what happened of your own knowledge—the only thing you know of what happened after the engine moved east is what you have been told? moved east is what you have been told?

"A. Yes, sir.

"Q. Do you know the name of the brakeman?

"A. No, I don't.

"Q. Do you know if it was Hammells?

"A. Yes; Hammells.

"Q. And the name of the engineer was Bratton?

"A. Yes, Billy Bratton.

"Q. Now, you say the brakeman was piloting the engine, what did you mean by that?

"A. Takes the engine to get water; throws the switch ahead of the engine; if any of the switches are to be thrown he throws them.

"Q. He was throwing switches from one track to another?

"A. Yes, sir.

"Q. And this engine had to go over several switches after
171 it left the water crane—before it got into the south side yard?

"A. Yes; several of them.

"Q. We are taking this deposition because you are going away in service?

"A. Yes, sir.

"Q. Naval service?

"A. Yes, sir."

CLAUDE R. HAMMELL, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. von Bernuth.

Q. Mr. Hammel, what is your business now?

A. I am a shipbuilder.

Q. Where?

A. At Port Newark, New Jersey.

Q. And you are not connected with the defendant, the Erie Railroad Company, now?

A. In no way.

Q. Were you in the employ of the Erie Railroad Company on January 5, 1917?

A. I was employed at the Jersey City yards.

Q. In what capacity?

A. As a brakeman.

Q. And were you one of the brakemen connected with the crew of engine 104?

A. I was.

Q. The engine of which Mr. Brown was the conductor?

A. Yes, sir.

Q. And Bratton and McCarthy were the engineer and fireman?

A. Yes.

Q. How many other brakemen were there in the crew besides yourself?

A. Well, one; if I remember right; that is all there ever is.

Q. And at the time this accident happened do you know where this other brakeman was?

A. He was down in the south yard, checking up the cars.

Q. That is away across, beyond Pavonia Avenue?

A. In what they call the local yard.

Q. Several blocks away from where this accident happened?

A. Yes.

172 Q. Now, do you recall going to the water tank that night?

A. I do.

Q. And how many men were on the engine besides yourself?

A. Engineer Bratton, McCarthy, the fireman and myself.

Q. And what were you doing on the engine; why were you there?

A. I was at the water tank with them until they started to back down, and I got on the front step of the engine, which was backing down.

Q. I know, but why were you with the engine; were you throwing switches?

A. I was to throw the switches and assist in getting the engine over.

Q. In other words, you were going ahead of the engine so the switches could be thrown, so the engine could cross over and go in the south side yard?

A. Yes.

Q. Do you recall Mr. Webb coming up?

A. No; I do not remember that.

Q. Do you remember the engine starting up?

A. I do.

Q. Were you on the engine when she started to move?

A. I stepped on as soon as she started to move.

Q. What part of the engine did you step on?

A. What we call the front part of the engine, but that was the rear part of the engine at that time, backing up.

Q. So that the engine was running backwards?

A. The tank of the engine was running backwards.

Q. The tank or tender was the front part as the engine was running?

A. That was the front part as it was running.

Q. And you were standing on the rear as the engine was running?

A. Which would be the front part, ordinarily.

Q. When she is standing still?

A. Yes.

Q. When the engine started up, what, if anything, did the engineer do with respect to bell or whistle?

173 A. He did as usual, blew the whistle three times and rang the bell.

Q. After that did the engine go back?

A. It moved back slowly.

Q. Along the coal pocket track?

A. Along the coal pocket track; yes, sir.

Q. Right next to the coal pocket?

A. Yes, sir.

Q. And how far down toward the east were you going?

A. How far down were we going?

Q. Yes?

A. Just to clear the switches, the cross-over switches.

Q. I show Defendant's Exhibit E and ask you if you can understand the map?

A. Here is one switch and here is another (indicating).

Q. Well, now, at the time you were standing at the water tank, you were located on the coal pocket track right opposite?

A. Right here (indicating).

Q. You were going back toward the east?

A. Right down here (indicating).

Q. As far as what switch?

A. This switch here (indicating).

Mr. von Bernuth: The witness indicates the switch marked "Switch to ash pit track."

Q. And then you were going to move the engine back over the ash pit track?

A. We backed down to clear the switch. Then we were going to cross over, out onto the first ash pit track.

Q. And come on up over the ash pit to the switches to the west?

A. That leads to the south yard, the local yard.

Q. By the switches do you mean the switches connecting these two tracks, called "Track and Elevator Lead," at the left-hand bottom side of the map?

A. Yes, sir; right here (indicating).

Q. With the tracks on the ash pit?

A. Yes.

Q. These tracks go where?

A. Down to the south yard, or local yard.

174 Mr. von Bernuth: I am going to mark them "Tracks to south side or local yard," with an arrow indicating the direction of the local yard.

Q. Is there a place indicated on this map which is the oil house that Mr. Brown referred to?

A. Right here (indicating).

Q. You are indicating the building marked "Oil House," colored red on the map?

A. Yes, sir.

Q. And that is located to the south of the water tank and the coal pockets?

A. Exactly.

Q. Did you stay on engine 104 all the time that it backed down toward the east?

A. I stayed on it until I got to the first switch; it is customary to get off and throw that and walk down and get the further switch, further down.

Q. Which switch were you going to throw first?

A. This one right here, right opposite (indicating).

Q. Are you pointing at this one or this one? Do you understand the map?

A. I see. I was making to throw the first one here opposite the one where Szary was hit, and walk down to the other.

Q. Your engine was going straight back?

A. Yes.

Q. Was it going to cross over onto this track (indicating)?

A. Yes.

Q. Over the ash pit?

A. Yes.

Q. It would not go over that switch (indicating), would it?

A. No. I was mistaken in the switches. This is the switch (indicating).

Q. This switch here?

A. Yes; we had to cross over.

Q. And after you had thrown that switch you were going to walk down to the switch which is marked "Switch to ash pit track"?

A. That is the one.

Mr. von Bernuth: I will mark the switch indicated by Mr. Hammell as the switch he was going to throw first, "Switch Mr. Hammell was going throw first."

175 Q. The second switch you were going to throw is the one which is marked on this map, "Switch to ash pit track"?

A. Yes, sir.

Q. After you got off the engine did the engine continue on to the east?

A. To clear the switches.

Q. By that you mean to go to the east of this second switch that you were going to throw?

A. Yes.

Q. And what did you do after you got off the engine?

A. Well, I hadn't time to throw the switch yet when I heard Szary groan.

Several Jurors: We do not hear you.

The Witness: I got off the engine, and I didn't have time to throw my switch yet when I heard the man groaning that had been run over.

Q. And did you turn to see who was groaning?

A. I went right to him.

Q. And where did you find him?

A. I found him lying between the rails.

Q. Of what track?

A. Of this coal pocket track.

Q. And can you tell about where you found him with respect to the east end of the coal pockets?

A. Well, I should say about twenty-five feet, something like that, from the east end of the coal pockets.

Q. Twenty-five feet from the east end of the coal pockets?

A. Twenty or twenty-five feet, something like that, I could not say. That would be around here somewheres (indicating).

Q. Nearer the ash pits or away from the ash pits?

A. Well, about right here (indicating).

Q. I see. In other words, you would locate his body as lying a little bit further to the west, or the water tank, than where Mr. Webb has located it?

A. Well, I would say about half way between that switch and the end of the ash pit.

Q. The east end of the ash pit?

A. Yes.

176 Q. Was Mr. Webb there at that time?

A. Well he came along in a minute or two.

Q. And did you and Mr. Webb take the plaintiff off of the track?

A. Yes. I tied his leg up, and Mr. Webb and I carried him off the track and laid him between the coal pocket track and the first ash pit track, on my overcoat.

Q. Was the body lying between the tracks when you found the plaintiff?

A. The leg that was cut off was laying over the rail nearest to the coal station.

Q. Nearest to the coal pockets?

A. And he was lying, I would say, on an angle of forty-five degrees, something like this (indicating), right between the rails. Otherwise he would have lost his head. Lying sort of——

Mr. Robinson: Well, the leg that was cut off was between the most easterly rail and the——

Mr. von Bernuth: The southerly rail.

Mr. Robinson: Between the southerly rail and the coaling station, that was completely off the track, to the south of it; is that right; the severed leg?

The Witness: Just hanging over the rail. That is where I found him.

Q. Do you remember whether or not the arc lights at the ash pits were lighted that night?

A. I cannot recall whether they were or not.

Q. After the accident happened what did you do with Szary?

A. I stayed right with Szary. First of all I bound his leg up with my handkerchief, and held it until Mr. Webb got a rope, and we tied his leg tightly. I took my overcoat off and we laid him on it between the two tracks, the ash pit track and the first coal pocket track; between the coal pocket track, I should say, and the first ash pit track, laid him between the tracks on my coat.

177 Q. And you waited there until the ambulance came?

A. No; we waited until a man came out with a stretcher.

Q. Talk up so they can hear you?

A. We stayed there with him until one of the men came out with a stretcher from the office, and put him on that.

Q. And then did you go back to your own engine?

A. No; I did not, right away. I carried him out to, I think it is Provost Street. There I stayed with him until the ambulance came from St. Francis' Hospital, and after that I went on down and met Mr. Brown here by the oil house, and told him of the accident.

Q. The point indicated by red coloring?

A. That is the place.

Q. How long had you been switching cars around the yard before the accident?

A. That night?

Q. No; generally, before the 5th of January?

A. Well, I had worked for fourteen months for the New Jersey Central.

Q. But I mean prior to January 5, 1917, how long had you been working for the Erie?

A. For the Erie, one month.

Q. And during that time had you been switching in the south side yards?

A. I had been there a few times.

Q. The local yard?

A. Yes.

Q. And in that yard do they load cars with freight received in the freight station?

A. They do load and unload.

Q. Load them on tracks immediately adjacent to the freight station?

A. Yes.

Q. And did the crews with which you were connected, were they in the habit of switching empty cars at times into those tracks?

A. They were.

Q. For loading?

A. Yes.

Q. And were some of the cars that were loaded at that station, on the tracks south of the local station at Jersey City, were they destined, some of them, for points in New Jersey?

A. They were for all over, in New Jersey, and all around.

Mr. Robinson: They cannot hear you, Mr. Hammell.

The Witness: They were loaded for points in New Jersey and other States.

Q. Some of the cars were for New Jersey points?

A. Yes.

Q. And other cars were for points outside?

A. Yes.

By Mr. Robinson:

Q. They were to go into the same trains, were they not?

A. Not necessarily in the same trains; they might go in any train.

Q. What I mean is, that local trains and cars going to other States—

The Court: Let him finish the direct.

Mr. Robinson: I beg your pardon; that is all.

By Mr. von Bernuth:

Q. What I mean is that some of the cars that were loaded at that station were destined for points like Newark, New Jersey, and Montclair, New Jersey, and places like that?

A. Some of them.

Q. And did not leave the State at all?

A. No.

Q. The switch engines that worked in the yard used to place empty cars for loading with such sort of freight?

A. Yes.

Q. And did that all the time that you were working in that yard?

A. Yes.

Q. And before this accident and on the day of the accident?

A. Yes.

Q. And did cars also arrive that were unloaded, at this
179 local station at Jersey City, that were received from points
in New Jersey?

A. They were.

Q. I mean, loaded at Passaic or Paterson, and received at Jersey
City?

A. Yes; there were.

Q. Or Montclair, or some place like that; and the switch engines
that you worked there with had moved such cars into the local sta-
tion at Jersey City?

A. They had, yes.

Q. And all the switch engines that were working there in the
local yards, also the south side yard, were engines that took their
sand from the sand house where Szary was working?

A. They all did, yes.

Q. Do you know whether or not the headlights on the engine
104 were lighted, at the time of the accident?

A. They were lighted.

Q. Both the front and the rear lights?

A. Yes.

Q. And there were two, one at the front end of the engine?

A. And one on the tank.

Q. On the tank or tender?

A. Which would be the rear of the engine.

Q. What is the headlight composed of?

A. Well the headlight is a big square light, with an oil lamp
inside and a large reflector.

Q. Which is a disc?

A. Yes.

Q. And how wide is the disc?

A. Well, I would say it is about that big around (indicating).

Mr. von Bernuth: About fourteen to eighteen inches? It is agreed
it is about fourteen to eighteen inches.

Q. And that reflects the light out from the lamp?

A. Yes.

Q. And how do you know that the lights on the engine were
lighted, both on the front and rear end?

A. I saw them.

Q. Did you get on and off the steps of both the front and rear
end many times that night?

A. I was working on each end of the engine.

Q. And had been working on the engine for how long
180 prior to the time the accident happened that night?

A. I came to work at six and that happened at 9:05.

Q. Was the light on all the time?

A. It was.

Q. Both of them?

A. Yes.

Cross-examination.

By Mr. Robinson:

Q. The light that was attached to the tender is a movable light, isn't it? That is one that can be lifted off; it is not stationary; it can be lifted?

A. You mean the frame that the lamp sets in can be lifted off?

Q. I mean the lamp itself. The arrangement is such that the lamp—

A. That I could not say; I never examined one.

Q. You do not know whether that was permanently attached to the tender or not, do you?

A. I could not swear to it.

Q. Whose duty was it to light the lights on this particular engine and keep them lighted, yours?

A. Well, that would be either up to the fireman or engineer; that I could not say.

Q. You were the fireman, were you not?

A. I was the brakeman.

Q. Oh, the brakeman. And the fireman was McCarthy?

A. I believe that was his name, McCarthy.

Q. Did you see anybody light those particular lights, or either one of them, that night?

A. At that time of the year the lights are lighted when you come to work at six o'clock. It is always dark before then.

Q. You rode on this locomotive from the time it started up, did you not?

A. I did.

Q. But you got off it before it ran Szary down?

A. Well, I got off at the time you say it ran Szary down.

Q. Before it ran him down?

181 A. It must have been just a little bit before, because where he was run down was just a few feet south of the point of the switch, so naturally I would have to get off a little bit before.

Q. You got off, then, within about how many feet would you say, of the place that you afterwards found him lying?

A. Well, I would say I got off about fifteen or eighteen feet, something like that, west.

Q. Fifteen or eighteen feet?

A. West of where he lay.

Q. Yes, in other words, the locomotive traveled about fifteen feet from the place where you got off to the place where you afterwards found him lying?

A. Something about like that.

Q. And as you rode, while you did ride on the tender, you were up in the foremost part of it, were you not? I think you said you were on the step in the front?

A. I was on the front step, but that was the back part of the loco-

motive at that time. The front part of the locomotive was backing down.

Q. It was the foremost end in motion?

A. Yes.

Q. Or near that, that is what you mean. You were right at the head of the moving object?

A. Yes.

Q. That is, counting the head the direction toward which it was moving?

A. Yes.

Q. In other words, you were right in front of this thing as it moved?

A. That is it.

Q. And as you were standing there, at least you looked ahead, did you not?

A. Well, that I could not say; that is too far back to recall.

Q. What?

A. I could not swear to that, which way I was looking at that time. I don't remember.

Q. Well, was one of your objects in riding on the front there so that you might see ahead of you as you traveled?

A. Well, when I am riding that way I would not have to look at any certain distance to see which way things are going.

Q. You never have to look at anything?

A. No.

182 Q. I say, was it one of your objects in riding up at the head of this moving machine, so that you might see the track ahead of you as you approached it?

A. Well, as a general thing that is the way you ride.

Q. Yes. Railroad men, wherever they have the chance, they do look ahead?

A. Well, it is good policy to see how things are going.

Q. Yes, it is the only safe railroading, is it not?

A. Yes, sir.

Q. Well, were you looking ahead of you?

Mr. von Bernuth: I object to the question, "It is the only safe railroading," and move to strike out the answer of the witness.

Mr. Robinson: He says it is.

The Court: Strike it out.

Q. Well, were you looking ahead before you alighted from the tender?

A. You have got to look ahead when you jump off going in that direction, otherwise you would go head over heels. You have got to look ahead, you have got to face the front.

Q. Then you did look ahead of you first before you jumped off the step?

A. Naturally I did.

Q. You did not see Szary then, did you?

A. No, I did not.

Q. He was not on the track then, so far as you could see ahead of you?

A. Not that I know.

Q. You looked ahead and did not see him?

A. I would be on the opposite side from him.

Q. Well, you did look ahead of the tender as it moved, and you did not see him?

A. When I stepped off, yes.

Q. Have you any idea of how far you could see ahead that night?

A. Well, you could see to the back part of the engine.

Q. To the back part of the engine?

A. That is, from the cab you could see back to the hind part of the tender.

183 Q. I am talking about ahead of the moving object. How far, about, as you stepped off the rear, could you see ahead of the moving engine, in the direction in which it was moving?

A. I could see the end of the tank, and that was about all.

Q. The end of the tank, and about how many feet was that?

A. I never measured an engine to see.

Q. Well, haven't you any idea, from railroading eighteen months at that time? Haven't you any idea about the length of the tank?

A. Well, the tank itself ought to be about eighteen to twenty feet, something like that; I could not say exactly.

Q. Is that about the full distance that you could see under the conditions that existed there that night?

A. That is only the tank alone, but the engine and tank together would be about, I should say, forty feet.

Q. Do you think you could see forty feet ahead of you?

A. Well, I could see the end of the engine.

Q. Well, how far could you see distinctly ahead of you that night, do you think? How much in feet, without measuring it by the engine or anything else? Here is what I want to know, Mr. Hammell, at the time you jumped off of that tender you say you were facing and looking ahead of you?

A. Certainly.

Q. On the track on which the engine was moving, and in the direction in which it was moving. Now, at the moment that you got your last look ahead of that moving tender, about how far in feet could you see ahead of you distinctly?

A. Well, as I say, I could see about the length of the engine, from where I was on the front step I could see the hind part of the tank.

Q. You were on the front part of the tank, were you not?

A. The front part of the engine.

Q. The front part of the engine. Well, can you tell us in feet about how far ahead of the foremost part of that machine as it moved you could see, as you jumped from the tender?

184 A. Well, that would be about twenty to twenty-five feet, something like that.

Q. Beyond that it was impossible for you to see anything, is that right?

A. Yes.

Q. Now, you did jump, and the locomotive backed right on, leaving you behind it?

A. Yes.

Q. And separated the distance between you and it rapidly, did it not, as it moved?

A. Well, it moved slowly.

Q. Nevertheless, in a very short time there was considerable distance between you and the rear of the locomotive, was there not?

A. Yes.

Q. And you walked that distance, whatever it was?

A. I walked over to the switch.

Q. And when you jumped off the tender you had no reason to believe that any accident had happened?

A. No, not until I heard it.

Q. And it was while following the——

Mr. von Bernuth: One minute: I object to the question, when he jumped off the tender, as not testified to by the witness, and move to strike out the answer.

The Court: He said that.

Mr. von Bernuth: It is a misapprehension, if he did.

The Court: I will allow it. Objection overruled.

Q. What did you do, didn't you jump off the tender?

A. Not off the tender; off the front part of the engine.

Q. Well, off the front part of the engine. Then you followed it up, did you not?

A. Followed up the engine? No.

Q. What did you do when you jumped off?

A. I stepped off the engine to go over and throw my switch, but at that time I heard the man groan.

185 Q. And the sound came in the direction in which the train, the locomotive, had just backed, is that right?

A. It came from the spot where Szary lay.

Q. And that was right ahead of where you got off the engine; is that right?

A. Yes, that is right.

Q. And you went there and found him lying with a part of his body, with his leg, clear of this rail (indicating on blueprint)?

A. It lay right over the edge of the rail.

Q. Well, this is the rail, Mr. Hammell. Now, will you write your name just where you saw—that is the rail that he was over, is it not?

A. That is the rail his foot lay over.

Mr. Robinson: If I am not in the right, tell me.

Mr. von Bernuth: Let him point it out.

The Witness: I cannot tell exactly, because I am not so familiar with this yard and with the map; but I should say it was around here somewhere (indicating).

Q. Will you write your name on there?

A. Is it necessary to write the name?

Q. I would like to have you do so. There is no objection, is there? If there is, tell me, and I won't ask you.

A. I cannot see that there is. First of all, I will make a little mark right where it is, and I will write my name underneath it.

Mr. Robinson: Thank you. That is very kind of you.

(Witness marks on blueprint.)

Mr. Robinson: The witness has written the name "C. Hammell," to indicate about the point where he found——

The Witness: As near as I can tell.

186 Mr. Robinson: As near as he can, where he found Szary lying.

The Witness: Yes.

By Juror No. 5:

Q. What did you mean when you said, "Whoa," to the engineer?

A. I cannot recall that I hollered "Whoa." I was not driving a horse. I hollered to him, of course.

Q. I thought that the engineer testified that the brakeman hollered "Whoa" from the end of the engine. Am I right?

A. Well, I called to him, I won't say that I hollered "Whoa." I cannot recall what I did say, but I know I hollered to the engineer.

By Mr. Robinson:

Q. Well, he was a good distance away from you then, was he not?

A. He was to clear that furthest switch.

Q. Well, he was a good distance away from you when you hollered?

A. Yes; a fair distance.

Q. And his locomotive was still moving along, wasn't it?

A. No, his locomotive was stopped.

Q. Stopped? You were practically a new man in that section that night, too, weren't you?

A. I had been around there a month.

Q. Well, only in that particular part of the yards a few times, I think you said?

A. I had been there a few times.

Q. What do you mean by a few, three or four?

A. Oh, probably half a dozen.

Q. Not any more than that?

A. I would not say for sure.

187 Redirect examination.

By Mr. von Bernuth:

Q. Where were you standing when you yelled to the engineer after the accident happened; did you see the engine?

A. I could see his headlight.

Q. You could see the headlight?

A. I could see his headlight.

Q. And was the size of the headlight on the front end, which you were then looking at, the same as it was on the rear end of the tank?

A. They are both the same, if I remember right.

Q. It was a disc?

A. Yes.

Q. The engine, as you saw it, was where, with respect to the switch?

A. Just to clear the switch point, where he would cross from the furthest switch.

Q. The second switch?

A. Yes, sir; the second switch.

Q. The switch which connects the coal pocket track?

A. With the ash pit.

Q. With the ash pit?

A. Yes.

Q. Here is a diagram which was drawn by Mr. Robinson and is marked in evidence as Defendant's Exhibit D. Will you write your name at the point on the engine where you were standing, whether it was rear or front?

A. I am making a step here, right where I stood, on what we would call the front part of the engine.

The Court: Never mind that; you stood on the step on the front part of the engine.

Mr. von Bernuth: Let him write his name, to show that is where he was so that there will be no dispute.

Q. And the engine was running backwards, the rear end first?

A. Yes, sir.

Q. And when you used the words that you were standing
188 on the front end, you meant the end where the smokestack is?

A. Yes.

Q. But that was the rear end as the engine was running?

A. At that time, yes.

Q. So that when you got off, the engine had already passed the point where you were getting off?

A. That is it.

Q. The front end as it was running, which was the tank?

A. Yes.

Q. So that at the time that you got off, the engine and the tank were between you and anybody on the track ahead?

A. That is it.

Q. Were there any other engines around there at the time, on the ash pits?

A. The only one I can recall is the Hackensack engine.

Q. Were there any engines on the ash pits, do you remember?

A. That I could not say.

Q. You do not remember that?

A. I do not remember it.

DANIEL TIERSON, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. von Bernuth:

Q. Tierson, are you still in the employ of the Erie Railroad Company?

A. Yes, sir.

Q. In what capacity?

A. Hostler.

Q. And were you a hostler at the time this accident happened on January 5, 1917?

A. Yes, sir.

Q. And what is a hostler?

A. Why, they run the engines around the yard; run the locomotives around the yard.

Q. Run the locomotives between the ash pits?

A. All around the yard.

Q. All around the engine yard?

A. Yes, sir.

189 Q. You are what is known as an engine hostler?

A. Yes, sir.

Q. And after the engineers get off the engines, after their runs are over, the hostlers take charge of the engines; is that it?

A. Yes, sir.

Q. Do you remember the day of this accident?

A. Yes, sir.

Q. And where were you just before the accident happened?

A. Why, I had an engine setting on the pit. I had an engine on the ash pit, 106.

Q. Under the what?

A. I had 106 on the ash pit.

Q. Yes, and where were you before you found the plaintiff?

A. I come down and got a water-glass light and I was coming back when I found—

Q. Where did you get the water-glass light?

A. In the head-light shanty.

Q. Where is that with respect to the sand house, east or west?

A. East.

Q. You say you had left your engine 106 on the ash pits?

A. On the ash pits.

Q. And you had gone to the east to get a water-glass light?

A. That is it.

Q. And you were on your way west again towards the ash pits when you found the plaintiff?

A. I found Hammell.

Q. You found Hammell?

A. And Szary groaning there.

Q. And where did you find Hammell and the plaintiff?

A. About, I should judge, about twenty-five feet from the east end of the coal pockets.

Q. Twenty-five feet from the east end of the coal pocket?

A. Yes, sir.

Q. And where was the plaintiff lying?

A. Why, he was laying in between the tracks.

Q. Of the coal pocket track?

A. The coal pocket track; yes, sir.

190 Q. When you say laying in between the tracks, you mean in between the rails?

A. In between the two rails, yes.

Q. And did you help move him off the track?

A. No; I went down and telephoned for the ambulance.

Q. You went back to telephone for the ambulance?

A. From St. Francis' Hospital.

Q. And this point which you pick as being about twenty-five feet from the east end of the coal pockets, was between the ash pits and the east end of the coal pockets?

A. And the east end of the coal pockets.

Q. So he was lying somewhere between the east end of the coal pockets here as marked on this map, and the east end of the ash pits, somewhere in here; is that right? Do you understand the map? This is the end of the coal pockets, this is the coal pocket track, and there are the ash pits. This is the coal pocket track here (indicating)?

A. He laid in around here (indicating).

Q. Were you walking up the track just before you saw Hammell?

A. Walking up alongside the track.

Q. Which track?

A. Coal pocket track.

Q. Did you see this engine 104 coming from the east?

A. Yes, sir.

Q. How did you see it?

A. Headed west, backing up.

Q. Was the headlight lighted?

A. Yes, sir.

Q. What was the first thing you saw of the engine as it was coming towards you, and you were walking west?

A. The headlight, the front headlight.

Q. How far were you away from the engine when you saw the headlight?

A. About twenty-five feet, I guess it was.

Q. Do you know whether or not the electric lights on the poles at east end of the ash pits were burning the night of the accident?

A. They were lighted.

Q. And you were going on and off the ash pit all the times?

A. Yes, sir.

191 Q. Where these lights were?

A. Yes, sir.

Cross-examination.

By Mr. Robinson:

Q. You were walking right towards the back of this locomotive, as it traveled, were you not?

A. I was coming over there (indicating).

Q. You were walking right towards it, you say, you were walking along the track that it was coming on?

A. I was not walking along the track; I was walking alongside of the track. I would not walk in the track.

Q. That is what I mean. Here is the track, we will say these two sides of this ridge represent the track (indicating)?

A. I was walking alongside of the track.

Q. Wait, see if I am telling you right. The locomotive was backing down here, and you were walking along the track towards it?

A. Walking alongside the track.

Q. Coming together closer every moment, the rear of the locomotive and you; is that not right?

A. No; I was on the right-hand side here, and he was coming down.

Q. So you were alongside of this track. There is the track, and there is the locomotive that was backing along it, that sheet of paper, we will say, coming down this way. Now, then, you were walking alongside the track towards it?

A. Yes.

Q. The two of you coming closer together every second; is that not so?

A. Yes, sir.

Q. And the track was straight there, too?

A. The track was straight.

Q. For probably two or three hundred feet, was it?

A. I don't know.

Q. Quite a good distance?

A. Not from where I was, no.

Q. What?

A. Not from where I was, it was not straight two hundred feet, unless going west.

192 Q. Well, there it is, according to your own testimony;

there is the track (indicating on blueprint) you were walking alongside of, is it not, the coal pocket track? You were walking this way, were you not, towards the west? Do you know what the points of the compass are there? Yes or no?

A. I was walking this way here (indicating).

Q. Do you know what west and east and north and south are there?

A. Yes, sir.

Q. Then you were walking west, were you not?

A. Walking west, yes, sir.

Q. And the locomotive was backing east?

A. East.

Q. Now, you say you saw a headlight on that tender?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. You could not see it until you got within about twenty-five feet of it, could you?

A. Just walked over the track before; when I looked I see it coming down there.

Q. Before?

A. Just before the engine got down there. I crossed over the track to walk up to the ash pit, before I came down.

Q. Did you look to see if you could see a headlight?

A. I could see a headlight on there.

Q. Did you look to see before you crossed the track, did you look for a headlight, or did you look for an engine?

A. I saw the engine coming down with a headlight on it.

Q. You said you were walking along this track when you saw this headlight (indicating on blueprint). There it is. Walking alongside this track; is that right?

A. I was walking up alongside that track.

Q. Well, were you walking in there, along in that direction that I draw this lead pencil; is that right?

A. Yes. I did not walk that far.

Q. Well, this is the track, this straight track shown on this diagram, that this man was run down on, is it not?

A. Yes, sir.

193 Q. And the locomotive that ran him down came from up here somewhere, did it not (indicating)?

A. Yes, sir.

Q. And the track from the point where it started up to the point where you were walking when you saw the headlight is perfectly straight, is it not?

A. In that place, yes, sir.

Q. And you say you were not able to see this light on this locomotive until you got within twenty-five feet of it, did you not?

Mr. von Bernuth: I object to that, on the ground that the witness has not testified to any such thing.

Mr. Robinson: I think he did, your Honor.

The Court: What do you say now, were you or were you not?

The Witness: I crossed over that track, as I started to walk up and I seen that engine coming down.

Q. How far away from you was it when you saw it? Didn't you say about twenty-five feet?

A. About twenty-five feet.

Q. That is a fact?

A. Yes, sir.

Q. And you could not hear until you got within twenty-five feet?

A. I just crossed over, I told you; I just came over from the headlight shanty.

Q. So you crossed the track?

A. Yes, sir; I crossed the track.

Q. Before you saw it at all?

A. And I just seen it coming down. Otherwise I was out of it, away from that track altogether.

Q. What is your business there, Mr. Tierson?

A. Hostler.

Q. Oh, yes, hostler; I remember that. When did you first tell anybody that there was any light on the rear end of that tender?

A. When? When I made out a statement.

194 Q. Did you ever make out a statement yourself about what you knew of this accident?

A. Why, yes, sir.

Q. Did you write it out yourself?

A. Yes, sir.

Q. In your own handwriting?

A. Yes, sir.

Q. Where?

A. For the claim agent.

Q. Did he tell you what to write?

A. No, sir.

Q. Have you seen your statement lately?

A. No, sir.

Q. Have you seen it since you gave it to the claim agent?

A. No, sir.

Q. Did he swear you to it?

A. The claim agent?

Q. Well, anybody?

A. No, sir.

Q. Did you ask to see if before you came to court to be a witness in this case?

A. No, sir.

Q. Don't you think it would have helped you to remember better what you really did see that night?

A. I don't think it would.

Q. What?

A. No, sir.

Q. Well, in some way or other you learned, did you not, that it was important to convince this jury that there was a headlight on the rear end of that tender; did you not?

A. I am telling just what I seen.

Q. Well, you know, do you not, you want the jury to believe that?

A. Yes, sir; there was a headlight lighted on that engine.

Q. You know that is one reason that you are here, is it not?

A. Yes, sir.

Q. To make the jury believe that there was a headlight on the rear of that engine?

A. There was a headlight.

Q. Yes?

A. Yes, sir.

Q. And you want the jury to believe that, do you not?

A. Well, it is up to them.

Q. Don't you care whether they do or not?

A. Yes, sir.

Q. You do care, you want them to believe it don't you?

A. Yes, sir.

195 Redirect examination.

By Mr. von Bernuth.

Q. It was when you turned that you saw the light, as you turned to the west?

A. Yes, sir.

Q. And before that time how had you been facing?

A. Coming across.

Q. That was from the north?

A. Yes, sir.

The Court: We will take a recess until tomorrow morning.

Adjourned to Thursday, May 16, 1918, at 10.30 A. M.

New York, May 16, 1918.

Mr. von Bernuth: I offer in evidence a letter received from the Director General of Railroads, W. G. McAdoo, dated December 28, 1917—the letter speaks for itself—notifying the defendant that the president assumed the control of railroads.

Marked Defendant's Exhibit G.

Mr. von Bernuth: I also offer in evidence two letters from the Director General of Railroads, the first dated April 9, 1918, and known as General Order No. 18, which were received by the defendant, and the second dated April 18, 1918 and known as General Order No. 18A.

Marked Defendant's Exhibits H and I.

CLAUDE L. HAMMELL recalled:

By Mr. von Bernuth:

Q. Mr. Hammel, how long was 104 at the water crane before it started to back to the east?

A. I should judge about four or five minutes.

No cross-examination.

196 THOMAS F. WEBB recalled:

By Mr. von Bernuth:

Q. Mr. Webb, what is the work that is carried on at the ash pits, work carried on on January 5, 1917, and prior to that time?

A. Well, the ash pit is for the cleaning of fires and dumping pans. There is an electric light situated on the east and west ends of the pit. They have six fire cleaners and a foreman, four laborers; these men clean the fires and they dump the pans with what they

call a pan hook, which is a bar about that big and about four feet and a half long (indicating); and this bar is for to open the slides on the pans and then hook the pans out with a hook, put the ashes out in the pit.

Q. And are there any other tools which these men use in cleaning fires?

A. They use what is known as a hoe, a pan hoe, to hoe out the side pans.

Q. And how long are they?

A. About three feet and a half.

Q. And how do the men that are working on the pit get at the engines, the fire pans?

A. Well, they can work from both sides.

Q. From the side of the engine?

A. Yes, sir, either side.

Q. And do they work from both sides?

A. Yes, sir.

Q. Were these men working there from both sides of an engine standing on ash pit track No. 1?

A. Yes, sir.

Q. On January 5, 1917?

A. Yes, sir, they do it every day and every night.

Q. And the lights on the telegraph poles are for the use of the men on the ash pits?

A. Yes, sir.

197 Cross-examination.

By Mr. Robinson:

Q. Was the work in the ash pit active at the time of this accident? That is, were there any other men dumping ashes into it at that particular time?

A. Well, I could not say, just at that time.

Q. You do not know whether men were working there or not at that time?

A. I certainly do know the men worked there every day and every night.

Q. Well, were there men working at the ash pit?

A. Yes, sir.

Q. At the time of this accident?

A. There were only two engines on the pit?

Q. What?

A. I say there were only two engines on the pit at the time of this accident.

Q. There were two engines on the pit?

A. Yes, sir.

Q. And were both of those engines emitting smoke, steam?

A. Well, you can say they were emitting smoke; they have to clean the fire and cover the fire over.

Q. And of course the ashes that were being dumped on to the pit—

A. Yes, sir.

Q. They were hot, burning ashes, that emitted smoke and vapor, too, is that so?

A. Yes, more or less.

Q. So altogether it was pretty well clouded around there, was it not?

A. Well, it was a bad night, dark night.

Q. Now, there is no doubt at all, is there, Mr. Webb, that Szary, in going from the place he said he got his drink of water, back to the place that you heard him say he left his pail, would have to cross this track at some point, is there?

A. He had to cross the track to get back in the sand house.

198 ROBERT P. ZOURNER recalled:

By Mr. von Bernuth:

Q. Mr. Zourner, I show you Defendant's Exhibit E, and ask you to tell me the distance from the points of the switch marked on this exhibit, "Switch Mr. Hammell was going to throw," to the points of the switch marked on this exhibit, "Switch to ash pit track"?

A. Two hundred and five feet.

Defendant rests.

Testimony closed.

Mr. von Bernuth: I renew the motion to dismiss that was made on behalf of the defendant at the end of the plaintiff's case on all grounds stated in the motion at that time.

Motion denied. Exception for defendant.

Mr. von Bernuth: I now move to dismiss the complaint, at the end of the whole case, on the following grounds:

First. Plaintiff has failed to prove a cause of action against the defendant.

Second. The plaintiff has failed to prove the cause of action alleged in the complaint.

Third. The accident happened solely because of the contributory negligence of the plaintiff.

Fourth. The accident happened as a result of one of the risks of the plaintiff's employment which were assumed by him.

Fifth. The plaintiff was not engaged in the interstate commerce of the defendant within the meaning of the Federal Employers Liability Act.

199 Sixth. This Court has no jurisdiction, and (or) should not proceed in this case, on account of the proclamation of the president, dated December 26, 1917, with respect to the assumption of control of railroads by the United States Government, and the orders made by the Director General of Railroads, pursuant to such proclamation, and particularly also the orders known as General Orders Nos. 18 and 18A.

The Court: I will deny the motion.

Mr. von Bernuth: Exception, on each and all of the grounds. I would like to amend the last ground, so that it will read:

"The Court has no jurisdiction or should not proceed" instead of "and."

The Court: Yes.

Mr. von Bernuth summed up to the jury on behalf of the defendant.

Mr. Robinson summed up to the jury on behalf of the plaintiff.

Defendant's Requests to Charge.

1. You cannot find a verdict for the plaintiff on any other theory of the accident than that claimed by him, and if you do not believe that the accident happened as the plaintiff says it did, your verdict must be for the defendant. (Charged.)

2. The plaintiff assumed all the risks ordinarily incident to the work in which he was engaged, that is, he took all the chances of injury resulting from the usual manner in which the work was carried on at the place where the plaintiff was injured. (Charged.)

200 3. Plaintiff assumed all risks, that is, took his chances of injury which were due to conditions that were open and obvious to him, or of which he should have known as a reasonably careful person, even though due to defendant's negligence, and if you find that the accident happened as a result of such risks or the taking of such chances, your verdict must be for the defendant. (Charged.)

4. If the jury find that the defendant's operations at the place or places where the plaintiff was working were carried on in a negligent or unnecessarily dangerous manner, but that the plaintiff continued to work at such place or places, knowing of the dangers arising from such operations, then he assumed the risk of injury, that is, took his chances in continuing his work, and your verdict must be for the defendant.

5. When it is said that the plaintiff assumes the risk of dangers which may be due to the nature of the business, or to the neglect of the defendant of which the plaintiff was aware, it is meant that plaintiff takes upon himself the chance of injuries resulting from such dangers, and undertakes not to hold the defendant responsible therefor. (Charged.)

6. If you find that the plaintiff needlessly adopted an unsafe way of walking along the defendant's track, when there was a safe way provided by the defendant, then the plaintiff assumed all the risks of injury due to the use of the unsafe way, and your verdict must be for the defendant. (Charged.)

7. The jury cannot render a verdict for the plaintiff based solely on negligence of the defendant with respect to the methods used in conducting the work at and about the place where the plaintiff was

injured if such methods were customary and known to the plaintiff.
(Charged.)

201 8. The testimony of the plaintiff and any of his witnesses to the effect that they did not hear the bell or whistle of the engine which struck the plaintiff is of no avail and must be disregarded if they or any of them testified that they were not listening for such bell or whistle, as against the positive affirmative testimony of witnesses to the effect that such bell was rung and such whistle was blown. (Charged.)

9. If the jury find that plaintiff was in the yard and on the tracks of the defendant at the time of the accident for the purpose of disposing of burnt out ashes from the sand-drying stove, the plaintiff was not engaged in interstate commerce, and your verdict must be for the defendant. (Refused.)

10. Unless the jury find that the plaintiff at the time of his injury was engaged in the interstate commerce of the defendant, your verdict must be for the defendant. (Charged.)

11. The work or commerce of the defendant in which the engine which struck the plaintiff was engaged is immaterial in determining whether the plaintiff was engaged in such commerce. (Charged.)

12. The darkness at the place required of the plaintiff greater care to avoid trains moving in the yard. (Charged.)

13. The presence of smoke which would temporarily obstruct the plaintiff's view of the tracks imposed upon him the duty to exercise care commensurate with the situation, and, if necessary, in order to observe an engine upon the tracks, he was required to wait until the obstruction was removed before going upon the tracks, and if he failed in this respect, he was guilty of contributory negligence.
(Charged.)

202 14. If you find that the accident did not happen as a result of any of the risks assumed by the plaintiff and you find that the defendant was negligent and that the plaintiff also contributed to the accident by his negligence, then you must diminish the damages otherwise recoverable by the plaintiff in the proportion that the amount of negligence attributable to the plaintiff bears to the combined negligence of the plaintiff and the defendant.

15. As an illustration of the operation of the law as to contributory negligence under the Federal Employers' Liability Act—if you find that the accident was caused by the combined negligence of both the plaintiff and the defendant and that the negligence of the plaintiff contributed 50% to the accident, and the negligence of the defendant 50% to the accident, then you should award to the plaintiff 50% only of the damages which would have been recoverable by him had he himself been entirely free from negligence, and the accident happened solely by reason of the defendant's negligence.
(Charged.)

16. In ascertaining the loss of future earnings of the plaintiff by reason of the injuries sustained, you must consider and give adequate allowance for the earning power of money, and in so far as damages which you may award are on account of the loss of future earnings, they must be based upon their present value only. (Charged.)

17. If you find that the headlight was burning or the engine bell was rung, which would have warned the plaintiff of the approach of the engine if he had exercised reasonable care, he cannot recover and your verdict shall be for the defendant. (Charged.)

18. If, by the exercise of reasonable care, the plaintiff could have seen or heard the engine which struck him in time to avoid the injury, he cannot recover. (Charged.)

19. The witness Kishkel testified that he was not paying attention to bells or whistles, and you may disregard his testimony in this respect as against the positive statements of the defendant's witnesses that the signals were sounded. (Refused.)

Charge.

The COURT (MANTON, J.):

Gentlemen of the jury, the defendant, the Erie Railroad Company, is a railroad company engaged in interstate commerce as well as intrastate commerce; that is to say, that it hauls or carries freight and passengers engaged in passing between two or more of the States of the Union, and it also engages in hauling or carrying freight and passengers between various points within the State of New Jersey.

For the purpose of carrying on its business, on the 5th of January, 1917, it maintained a yard in Jersey City, in the State of New Jersey, and there it had what has been described to us here as a railroad yard, in which it had coal stations, an ash pit, a sand storage house and various other equipments that had to do with its business, both in carrying freight for interstate and intrastate commerce. Now at that place we have to do with the sidings and the houses which have been pictured here to you both by the photographs that have been offered in evidence and by the oral testimony of the witnesses, including the place where the sand house was located, and the sidings that were used by the engines and trains passing to and fro in that railroad yard.

204 The plaintiff, on the 5th of January, 1917, was engaged in work for the Erie Railroad Company in that yard. On that night he was on duty. It seems that one of his duties, or his principal duty, was to prepare this sand which was being used by engines engaged in both intrastate and interstate commerce, engines used by this railroad company; and as part of his work in preparing the sand they used heaters or stoves, which apparently were used for heating the sand.

Now, one of his duties was to remove the ashes from time to time from these stoves or heaters, and on the occasion in question or shortly prior thereto, while on duty, he responded to a call of thirst, and went to get a drink of water, passing into one of the houses where there was provided a pump of some kind where he might get a drink of water. He says that after getting his drink of water, he passed out of this house and then went over to get a receptacle which he used for carrying ashes from this sand house, and while engaged in that mission, going out to get this receptacle for carrying the ashes, he

was obliged to and did cross a track where engines passed up and down in the railroad yard. And he says that while crossing that track he was struck by a switching engine used in the yard, and received his injury.

Now, the railroad company lawfully maintained these tracks, it had the right and its employees had the right to pass up and down on that track, and if this was the way provided for the plaintiff to pass to and from this sand house, or to go to a place where this receptacle was placed, and that was the one safe way for him to go, he had a right, of course, to cross the railroad tracks. With each having the right to pass at the point of collision, where the engine collided with the plaintiff, then we have the inquiry of the respective rights and the respective duties and obligations, first of the railroad employees handling the engine on the occasion and at the time in question, and the rights and the obligations and the duties 205 on the part of the plaintiff in passing over the railroad track.

The railroad company, as I have said, was engaged in interstate commerce; that is, it ran its trains between States, engaged in hauling commerce and engaged in hauling passengers. I charge you that if you find, from the proof in the case, that it was engaged in hauling passengers and freight between States, and that as part of carrying on that commerce, as an instrumentality and a necessity for carrying on that commerce, it used sand in its business and used it in the locomotives for the purpose of running and operating the locomotives safely, and if the duty of this plaintiff on this occasion required him to help in the preparation of that sand, and as one of his duties at the time of the happening of this accident he was engaged in going to get a receptacle or a can used for taking ashes from a furnace or a stove which was used for heating that sand, and therefore for preparing the sand, if he was engaged in that work at the time he met with that accident and you are satisfied by the fair preponderance of the proof that the sand was used indiscriminately for interstate locomotives, and intrastate locomotives, then I charge you that the plaintiff at the time of the happening of this accident was engaged in interstate commerce. And the importance of your finding as to that is this, gentlemen, if you should find that he was not engaged in interstate commerce applying this test, then that is the end of his case and he cannot recover. But if you should find that he was engaged in interstate commerce under this rule that I have just called your attention to, then he is entitled to the benefits of the so-called Federal Employers' Liability Act that I shall call your attention to; and if he is entitled to recover under the rules of law prescribed in that statute, then he will be entitled to 206 damages at your hands.

The Federal Employers' Liability law provides this, that when one engaged in the service of a railroad company which is at the time engaged in interstate commerce, and the injured man is engaged in interstate commerce at the time of his accident, if that be the fact, then the railroad company is responsible for any negligence which results in his accident, whether it is due in whole or in part to the fault or the neglect or the want of care on the part of any of

the employees of the railroad company; so that if this man was injured at the time in question, and if his injury was caused in whole or in part by reason of the fault or the neglect of anyone in charge of the locomotive which struck him at the time of his accident, the railroad company under the Federal Employers' Liability Law would have to respond in damages for the negligence or the want of care or the carelessness of those in charge of that locomotive at the time in question.

Therefore, the inquiry will be first to determine whether those in charge of the locomotive on the occasion of the accident were in any way neglectful or careless in the management and operation of the locomotive, and in determining that, you will have regard for the time, the place and the circumstances under which the accident happened. It was at night, concededly it was a dark night, there was some mist, some fog, some smoke, and in a railroad yard where trains passed to and fro, as they lawfully had the right to do. Now, what, in the exercise of ordinary care and caution should an ordinarily prudent engineer, operating an engine under those circumstances, have done in having regard for the safety of men who were or might be obliged to cross the tracks? For the law says that those in charge

of that locomotive must exercise ordinary care and prudence, 207 such ordinary care and prudence as an ordinary, prudent, careful engineer would have exercised under all the circumstances as presented. And the plaintiff claims that there was a want of care, and that there was neglect on the part of those in charge of the locomotive, in that as this train passed over the point of accident it failed to sound a warning, warning this plaintiff as to the approach of the locomotive, which a reasonably prudent man operating the locomotive would have given as he approached this point of accident. He says that they failed to ring a bell, giving notification of the approach of that locomotive. He says that the locomotive was being backed down, and that there was no sufficient lights for him to see its approach, exhibited on the leading portion of the locomotive as it was backing down. He says further that there was a failure to sound a whistle.

Well, one of the employees of the company upon the witness stand has testified that it was the custom and the practice to ring a bell as the locomotive passed over that track, over this siding. He says in fact that there was a rule of the company that required it. Well, if it was the custom, if it was the practice to sound a bell in passing over that siding, then was the plaintiff justified in anticipating that some warning might be given to him of the approach of that engine as it passed over this track? If it was the custom, if it was the practice to do that, if it was the rule of the company, does that indicate a recognition by the railroad company and does that indicate an obligation assumed by the railroad company of giving some warning of the approach of engines as they passed up and down on that track? If there was such a rule, if there was such an assumption of obligation on the part of the railroad company, if in the exercise of ordinary care and caution you say some such warning by ringing 208 a bell should have been given, and you find that there was a failure to give warning by ringing of a bell as it passed over

this siding, then you may say the failure to ring that bell or give notice of the approach of the engine, some suitable notice, was negligence on the part of he who operated the engine or they who were in control of the engine or its operation at the time of the happening of the accident.

The same reasoning applies, the same rule applies, when you consider whether or not a whistle was sounded as this engine passed over that siding, and the same reasoning and the same rule applies in determining whether or not a light, ample to give notice, was exhibited on the leading portion of that engine as it passed down.

Now, it was not incumbent upon the railroad company to first provide a light, also to provide for the ringing of a bell, and also to provide the sounding of a whistle. The law says simply that they must exercise ordinary care and caution. If they used one or any or two of these precautionary methods of letting it be known of the approach of that locomotive you can say that satisfies the rule of reasonable care and caution, and was ample notice to this man as he approached the track.

You may take into consideration further, in determining whether the railroad company was negligent, whether or not the man in charge of the operation of this train exercised ordinary care in the management and in the operation of the locomotive, whether he was diligent and vigilant, whether he was exercising the care that the ordinary prudent locomotive operator would have exercised under all and similar circumstances.

If the plaintiff has established to your satisfaction, and he must establish by a fair preponderance of the proof that the claim
209 he presents as to the negligence of the railroad is true as he presents it—if he has established to your satisfaction that the railroad company was negligent in the particulars that I have called your attention to, then you pass to the next question, and that is whether the plaintiff himself was neglectful in any degree which contributed to the happening of the accident. So when you apply the rule of reasonable care and caution to those in charge of the operation of the locomotive, you also apply the rule of care and caution to this man, the plaintiff, who seeks damages at your hands. The plaintiff likewise must show that he exercised reasonable care and caution for his own protection, that he in no way contributed or helped to bring about the happening of his accident.

If this case is under the Employers' Liability Law that I have called your attention to, then the law says that even though the plaintiff may have been neglectful or at fault in some degree, if not solely to blame for the happening of the accident, then that would not defeat him of recovery, because under the same Federal Employers' Liability Law the plaintiff is entitled to recover if the defendant was neglectful and careless, and that negligence help to bring about the happening of the accident, even though the plaintiff was in part to blame for the happening of the accident. The law says that if the plaintiff is in part to blame, then the damages shall be diminished to the extent to which he was to blame for the happening of the accident. For example, if you should say that the railroad company was half to

blame and that the plaintiff was half to blame, and you were ready to give a verdict as measuring the damages of the plaintiff, for a sum, we will say, of \$5,000, \$10,000, \$25,000 or \$40,000, then you divide that in half, because the plaintiff must bear the loss of half, if
 210 he was to blame to the extent of a half. And so if you should say that he was to blame for the extent of twenty-five per cent or fifteen per cent or five per cent or seventy-five per cent, the law says that you must in that way calculate and determine the amount which the plaintiff has contributed, the degree in which the plaintiff has contributed to the happening of the accident, and he must bear that proportion of the loss by which he may have contributed to the happening of the accident, and the railway company must bear the burden of loss to the extent to which it has contributed to the happening of the accident, through its employees. In that way the loss is diminished. Of course, if the plaintiff was not to blame at all, if this accident was brought about solely by reason of the neglect of the railroad company, you will not be concerned in measuring the damages in that way; and so, too, if the plaintiff was solely to blame, if the accident was his own fault solely and the railroad company in no way contributed to the happening of this accident, then the plaintiff would not be entitled to recover, because the railroad company you can see would not be obligated and should not be obligated to contribute to this man's loss.

The plaintiff must show that he exercised the degree of care and caution which an ordinary prudent workman, similarly situated, under all these circumstances would have exercised, and that is reasonable care and caution for his own protection.

Now, if you are satisfied that the plaintiff has established by a fair preponderance of evidence that the railroad company was at fault, and neglectful, and that he was free from neglect, or that he was only in part neglectful, then you have further to consider this rule that has been invoked by the railroad company in its defense, and that is,
 211 the railroad company says that the plaintiff assumed the risk of this occupation and this injury; that the result, this injury to him, comes about because of the assumption of risk which he assumed by entering into the employ of the defendant.

Gentlemen, when a man enters the service of a company or an individual, he assumes those risks and those risks only which are open, obvious and apparent to him, and risks which are left after the master has exercised ordinary care and caution in providing the plaintiff with a reasonable safe place in which to do his work and reasonably safe appliances with which to do his work. But even if the master may be neglectful in supplying a reasonably safe place in which to do the work, if the servant knows that the danger exists, if he knows of the risk, he may, even though the master has not fulfilled his obligation of care and caution, if he goes on and continues in the work with full knowledge that the risk exists, he assumes that risk of injury, which may come because of some neglect or fault on the part of the master.

For example, the case is often illustrated by a man who chops wood.

A man who chops wood assumes the risks of chips flying around, striking him in the eye, striking him in the face. If he is struck by chips flying he is not entitled to recover; but he is only charged with assuming those risks, those risks only which are open, obvious and apparent, which he appreciates and assumes.

Therefore, to sum it up, you determine first whether the defendant was engaged in interstate commerce, and was the plaintiff at the time of his accident engaged in interstate commerce? If he was, then was the railroad company neglectful? If the railroad company was neglectful, then you turn to the next question, as to whether or not the plaintiff was guilty of contributory negligence, and if he was, to what degree was he guilty of contributory negligence? Or
 212 whether the plaintiff was entirely free from contributory negligence? And then you pass to the next and last question, that is the question of how much compensatory damages should he get for his injury.

The defendant claims in the case that it did all that ordinary prudent men would do in operating railroad engines.

It says that the man in charge gave notice of the approach of this engine, it supplied a light. It says that there were some lights in the near vicinity of the happening of this accident, the defendant says that in addition thereto it sounded the whistle and that it rang the bell, the bell was rung at the time the engine started. All those things, and determining what is the truth about them, are for your determination.

In determining that you have to determine what effect, what credence you are to give to negative testimony as opposed to positive testimony. Some of these men said they heard the engine bell ring, they saw the light. Others said that the engine bell did not ring, they did not hear it, they did not see the light. In determining who is telling the truth about that, you determine the position of each witness, his opportunity, his interest, whether he was giving a divided allegiance to the ringing of the bell or an undivided allegiance to the sounding of a whistle, or whether he was watching for lights; where was he stationed, where was his place, what was his opportunity, and with what care did he listen or see? All those things are something that help you to determine just where the truth is, and grasp the truthful testimony and then be guided accordingly.

If the plaintiff is entitled to recover, he is entitled to recover fair, ample and just compensation for the loss which he has sustained. Take into consideration his age, his position in life, his obligation to
 213 earn his livelihood by means of strong limbs, strong arms, physical strength, and say how much he has been impaired, and give compensatory damages for the pain and suffering that he had on the occasion of the happening of the accident, and from that day on to the present and even looking into the future. Give compensatory damages for the physical inconvenience and the physical discomfort that this man has sustained by reason of his accident. How much has this impaired him in going along down the avenue of life in which he started? He had traveled on in life to forty-four years of age. How much has his earning capacity been diminished by reason of this injury? What are his opportunities in

life hereafter? How much that means to him in dollars and cents you are to consider. It is not only his earning capacity, it is not only his ability to provide for himself or to earn as much wages as he did theretofore, but he is entitled to compensatory damages for the inconvenience in life, the discomfort in life; how much he is now going to be discommoded, all those things are something which you must consider, if he is entitled to recover.

Gentlemen, I leave that to your own sound discretion and judgment. You will give him an ample verdict if he is entitled to any verdict; if he is not, you will say so, just as you determine. You must give this plaintiff damages at this time that will compensate him for all time, if he is entitled to recover; he cannot come back again and ask a jury to compensate him again. You are the sole judges of the damages he is entitled to recover.

I denied certain motions made at the end of the case to dismiss the case and to stay the case. All those things, gentlemen, I have denied, and it means that I have no opinion as to the merits of the case one way or the other. I can sit here and leave that to you, that

214 is your burden. I simply mean that I considered there are questions of fact presented by the evidence, which I leave for your determination. It is your good sound judgment that must prevail, at this time and for all times.

I think I covered your requests; if there are any I have not, call my attention to them.

Mr. von Bernuth: I except to that portion of your Honor's main charge where you say—I think you said it more than once—that if the jury find that sand was used indiscriminately for interstate and intrastate commerce, the jury should find that the defendant was engaged in interstate commerce and the plaintiff comes within the Federal Employers' Act.

I also except to your Honor's permitting the jury to pass upon the question as to whether the plaintiff was engaged or was not engaged in interstate commerce under the Federal Employers' Liability Act.

I except to that portion of your Honor's main charge where you say, in substance, that the employees were permitted to walk along the tracks and that the plaintiff had the right to cross the track at the point of collision, in view of the situation.

I except to those portions of your Honor's charge—and I think you said it more than once—that if the jury find that the accident was due in whole or in part to the negligence of the defendant, upon that only the plaintiff was entitled to recover, or is entitled to recover.

Mr. Robinson: I think that was qualified later on by what your Honor said in regard to the assumption of risk.

The Court: Yes.

Mr. von Bernuth: What I mean is that even though the jury may find that the defendant was negligent, still if the jury find that the accident happened as a result of one of the risks that were assumed by the plaintiff, or one of the chances that he took in
215 continuing in the employ of the defendant, nevertheless their verdict must be for the defendant.

The Court: I charged the jury that. I will charge it in your language.

Mr. von Bernuth: I think your Honor *cured* the first statement, that the employee assumed only the risks inherent in the business, but he assumes all obvious and apparent risks which as a reasonably prudent man he should appreciate.

The Court: Yes, I charge that.

Mr. von Bernuth: I ask your Honor to charge that the jury cannot find a verdict for the plaintiff on any other theory of the accident than that claimed by him.

The Court: That is, that he was crossing the track, you mean?

Mr. von Bernuth: Yes.

The Court: Yes, I charge that.

Mr. von Bernuth: I ask your Honor to charge that if the jury find that the plaintiff needlessly adopted an unsafe way of walking along the defendant's track when there was a safe way provided by the defendant, then the plaintiff assumed all the risks of injury due to the use of the unsafe way, and their verdict must be for the defendant.

The Court: I charge that. I thought I covered that.

Mr. von Bernuth: I also ask your Honor to charge the jury that they cannot render a verdict for the plaintiff based solely on the negligence of the defendant with respect to the methods used in conducting the work at and about the place where the plaintiff was injured, if such methods were customary and known to the plaintiff.

The Court: I charge that.

Mr. von Bernuth: I ask your Honor to charge that the testimony of the plaintiff's witness Kishkel, to the effect that he did not hear the whistle or bell of the engine which struck the plaintiff, 216 is of no avail, and must be disregarded, in view of the fact that he testified that he was not listening for such bell or whistle, as against the positive affirmative testimony of witnesses to the effect that such bell was rung and such whistle was blown.

The Court: I leave that to the jury to determine, on the instructions already given.

Mr. von Bernuth: I except to your Honor's refusal to charge as requested.

Mr. Cannon: With the simple qualification that they "may" disregard it?

The Court: Yes, I will charge that they may disregard it.

Mr. Robinson: Yes; they may disregard anything.

Mr. von Bernuth: I ask your Honor to charge the jury that if the plaintiff was in the yard and on the tracks of the defendant at the time of the accident for the purpose of disposing, or in connection with the purpose of disposing of burned out ashes from the sand drying stoves, that he was not engaged in interstate commerce, and their verdict must be for the defendant.

The Court: I do not just understand that request. I noticed that here. Do you mean that if he was carrying ashes from the stove—wait a moment, do you mean that if he was carrying ashes from the stove which was used for heating the sand?

Mr. von Bernuth: Yes.

The Court: No, I refuse to charge that.

Mr. von Bernuth: I except to your Honor's refusal to charge as requested.

The Court: You do not mean by that in crossing the track? You mean just coming out and dumping the ashes?

Mr. von Bernuth: No, I do not request that. He was in the yard for the purpose, or had come into the yard for the purpose of dumping ashes from this sand-drying stove into the pit, he was not engaged in interstate commerce.

The Court: I will charge that if he was doing that he cannot recover, because the plaintiff's theory of recovery is different. He says he was crossing the track, he does not say he was doing that at all.

Mr. von Bernuth: I do not think you quite understand me. I merely mean the general purpose for which the plaintiff went into the yard of the defendant at that time, that that does not constitute interstate commerce.

The Court: I will refuse to charge except as I have already charged on that point.

Mr. von Bernuth: I except to your Honor's refusal to charge.

I ask your Honor to charge that the darkness at the place required of the plaintiff greater care to avoid trains moving about in the yard.

The Court: I charge that. The greater the danger the greater the care.

Mr. von Bernuth: I ask your Honor also to charge that the presence of smoke which would temporarily obstruct the plaintiff's view of the tracks, imposed upon him the duty to exercise care commensurate with the situation; and if necessary in order to observe the engine upon the tracks he was required to wait until the obstruction was removed before going upon the tracks, and if he failed in this respect he would be guilty of contributory negligence.

The Court: I charge that.

Mr. Robinson: I except to that.

Mr. von Bernuth: I ask your Honor to charge the jury that if they find that the headlight was burning or the engine bell was rung or the whistle was blown, which would have warned the plaintiff of the approach of the engine if he had exercised reasonable care, he cannot recover and the jury's verdict must be for the defendant.

The Court: I have already charged that. I will charge it again. Is that all now?

Mr. von Bernuth: That is all.

The Court: Any requests, Mr. Robinson?

Mr. Robinson: I have only this, your Honor. I except to your Honor's leaving it to the jury to find, as a question of fact, whether or not the plaintiff was engaged in interstate commerce at the time of this accident. I would just like to save that exception. You do leave it to them to decide as a question of fact.

The Court: No, I said that if the jury found that he was doing the work he claimed he was doing in his testimony at the time, that he was engaged in interstate commerce; and the further circumstance that the sand was used indiscriminately for interstate and intrastate commerce.

Mr. Robinson: Yes, sir.

Mr. von Bernuth: I except to your Honor's charge in that respect.

The jury retired at 1:05 P. M., and at 3:45 P. M. returned and an-

nounced that they had found a verdict for the plaintiff in the sum of \$20,000 (twenty-thousand dollars).

Mr. von Bernuth: I move to set aside the verdict and for a new trial, on the ground that the verdict is against the evidence, against the weight of evidence, contrary to law, and on all the grounds mentioned in Section 999 of the Code of Civil Procedure of New York, except that of inadequacy.

The Court: No, I think it is a question of fact for the jury. The jury's verdict I will let stand.

Mr. von Bernuth: I think the damages are very excessive.

The Court: \$20,000?

219 Mr. von Bernuth: Yes, because the present value of the earnings, even assuming that the plaintiff lived to be fifty-nine years old, fifteen years, is much less than \$14,000. The present value of \$14,000 he would earn in the next fifteen years is about \$8,000 or \$9,000.

The Court: Our courts have sustained as high as \$25,000 for a leg.

Mr. von Bernuth: They might in a case of a brakeman or conductor who was earning \$150 to \$200 a month, but here is a man earning \$70 or \$72 a month.

Mr. Robinson: That is only one item of damage.

Mr. von Bernuth: I know, but there is a limit to any compensation for pain and suffering. There is a case in 241 or 242 U. S., which holds that in estimating a loss of future earnings you have to take the present value of that money; and when you do that, with \$14,000 you bring it down to about \$8,000 or \$9,000; I do not know the precise figures, but it is around \$8,000 or \$9,000; and that would mean that there is \$11,000 or \$12,000 given for pain and suffering, which is clearly excessive.

The Court: Do you think it is excessive, Mr. Robinson?

Mr. Robinson: I certainly do not, and there is ample precedent in this court for holding that it is not.

The Court: We affirmed yesterday a case against the Lehigh Valley for \$18,000.

Mr. Robinson: I had the case of a man named Hanson against some lightering company. That man was earning only \$40 a month, and the little food that he got on a tug boat. It was not such a total destruction of his leg as we have in this case, and \$20,000 was affirmed by this Court, within eighteen months or two years at the most, by the Circuit Court of Appeals in this district.

The Court: No, I think I will let it stand.

220 Mr. von Bernuth: I take an exception, on all the grounds stated in my motion.

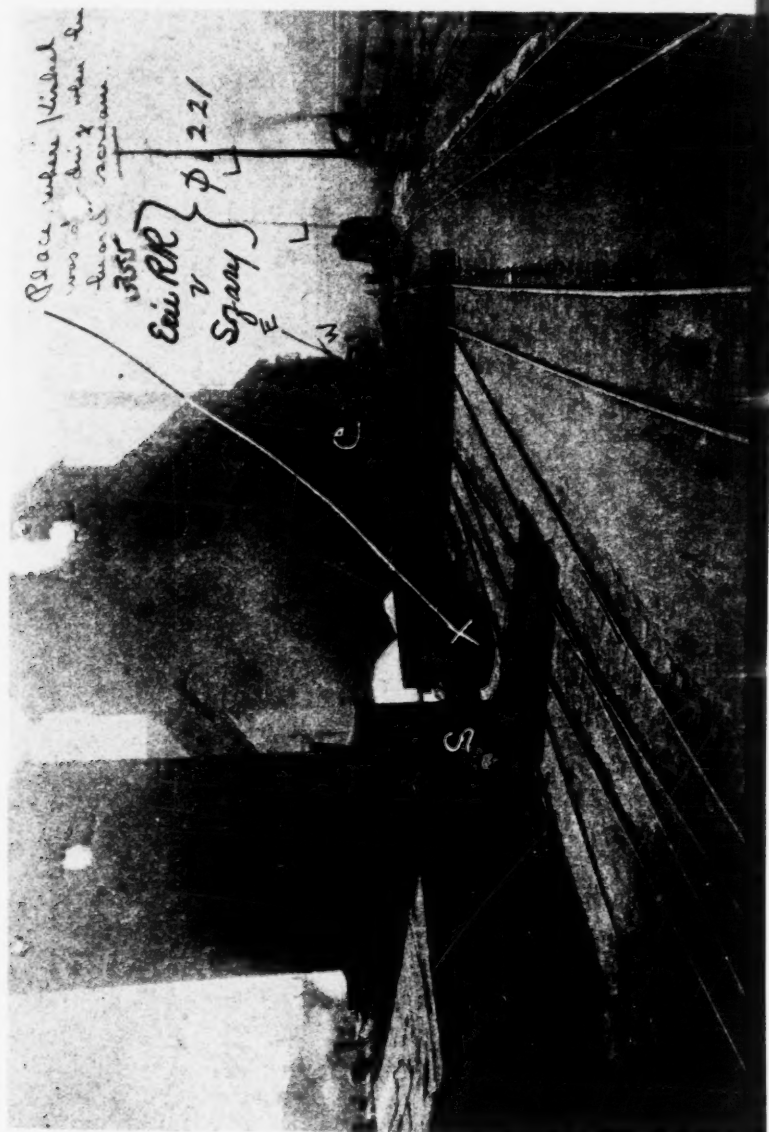
Your Honor will allow us thirty days stay?

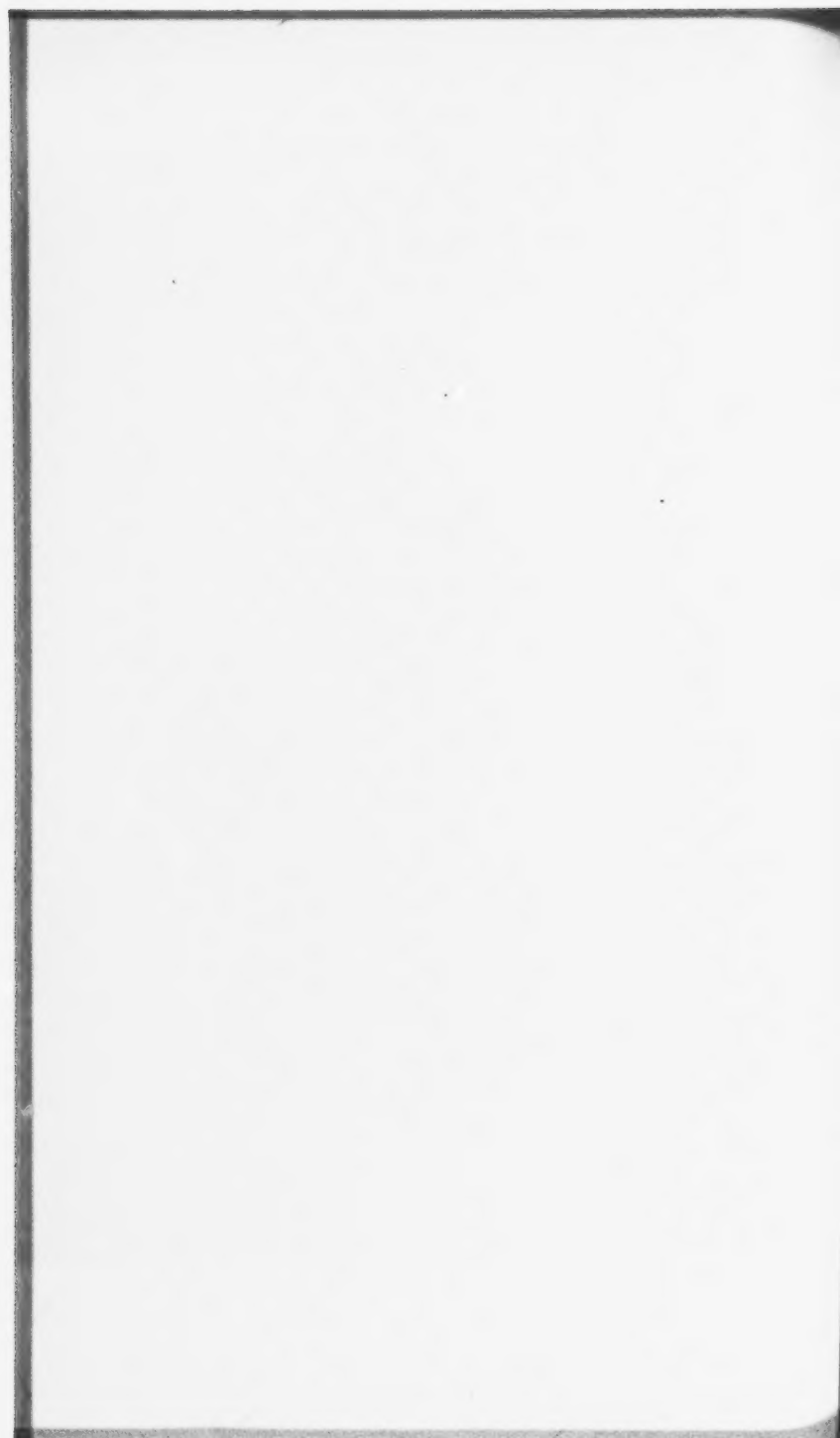
The Court: Yes.

The foregoing bill of exceptions is hereby allowed, signed and ordered to be made part of the record in this case.

Dated, October 7, 1918.

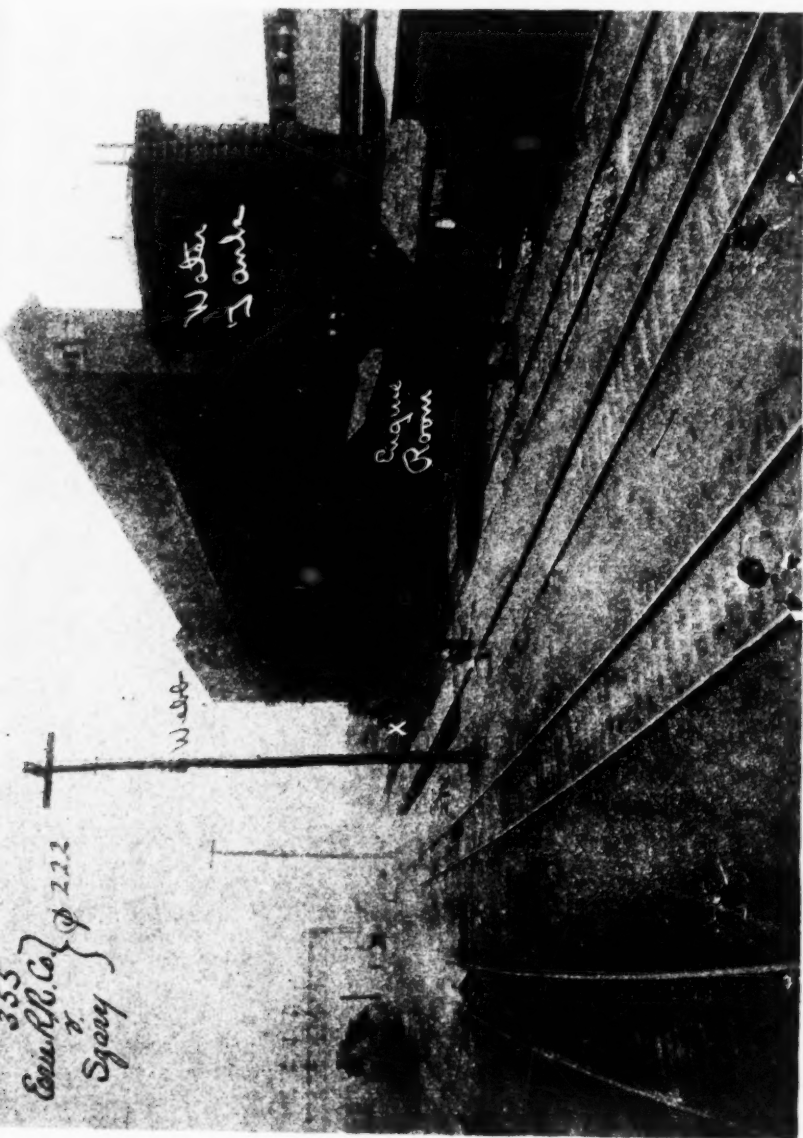
MANTON,
United States Circuit Judge.





221

DEFENDANT'S EXHIBIT A.



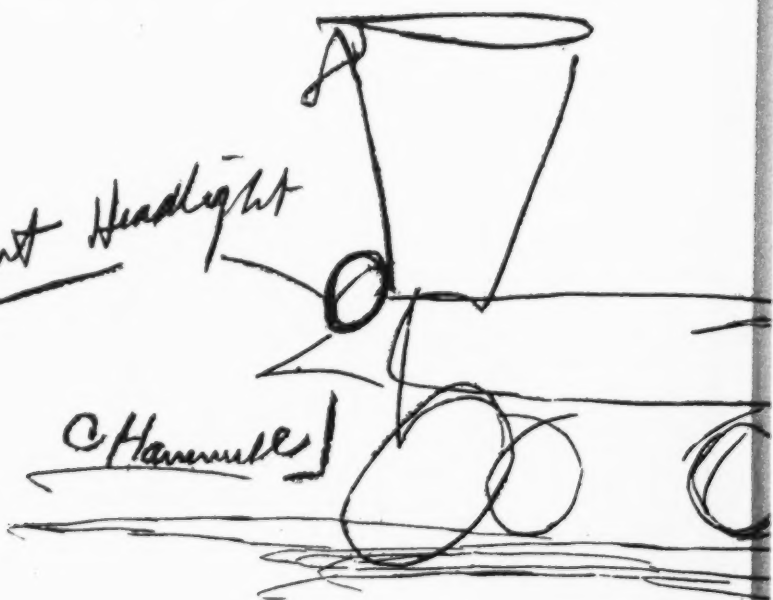
355
E. in RR } 223
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223

DEFENDANT'S EXHIBIT C.

Front Headlight

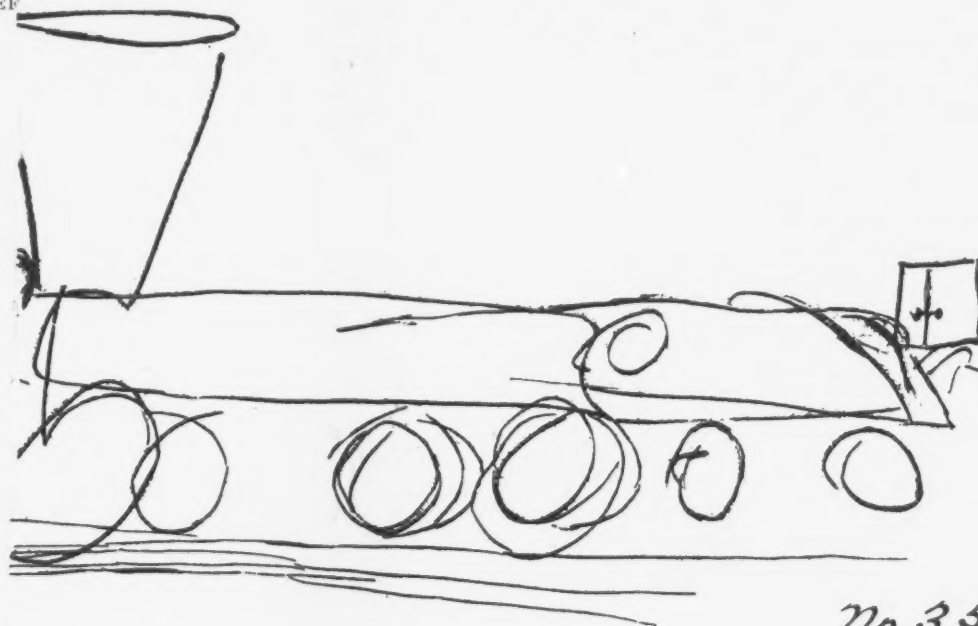
C. Hammett



Defto E. W. ~~Smith~~
May 15-1918

224

DEF



Box Hall Light

No 355
Erie RR } #224
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MAIN TRACK

Ballast

MAIN TRACK

Wood-Conduit

MAIN TRACK

Ballast

MAIN TRACK

SERVICE TRACK

Ballast

SERVICE TRACK



CINDER BALLAST

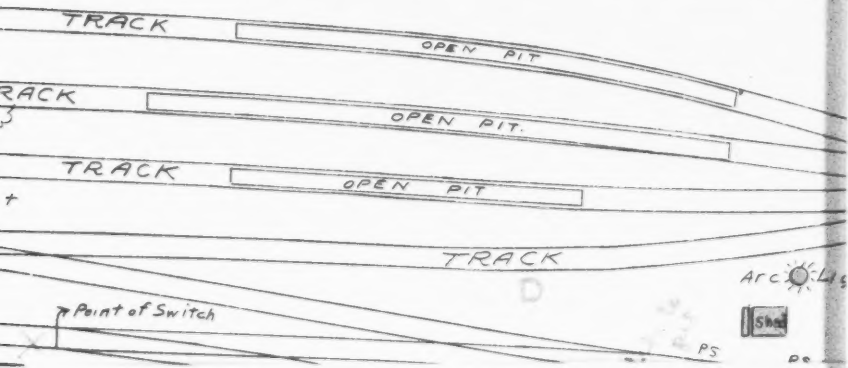
ARCLIGHT



CINDER BALLAST

Cinder Ballast
Painter Switch

C. Hammell



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ERIE RAILROAD COMPANY VS. ANTONI SZARY.

226

DEFENDANT'S EXHIBIT F.

United States District Court, Southern District of New York.

ANTONI SZARY, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

SIR: Please take notice that on the 17th day of January, 1918, at 2 P. M. before the Commanding Officer of Company A, 104th Engineers at Camp McClellan, Anniston, Alabama, at the Company Headquarters of Company A, 104th Engineers, we shall take the deposition of Joseph F. McCarthy pursuant to the rules of the United States District Court.

Dated at New York, January 7th, 1918.

STETSON, JENNINGS & RUSSELL,

Attorneys for Defendant.

Office & P. O. Address, 15 Broad Street, Borough of Manhattan, New York City.

To Stephen A. Machcinski, Attorney for Plaintiff. Office & P. O. Address, 31 Nassau Street, New York City.

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DEFENDANT'S EXHIBIT G.

Office of the Director-General of Railroads.

Washington, December 28, 1917.

To the Presidents and Directors of all Railroad Companies:

Having assumed the duties imposed upon me by, and in pursuance of, the proclamation of the President dated December 26, 1917, you will, until otherwise ordered, continue the operation of your road in conformity with said proclamation. You are requested to make every possible effort to increase efficiency and to move traffic by the most convenient and expeditious routes.

I confidently count on your hearty cooperation. It is only through united effort, unselfish service and effective work that this war can be won and American's future be secured.

W. G. MCADOO,

Director-General of Railroads.

DEFENDANT'S EXHIBIT H.

United States Railroad Administration.

Office of the Director General, Washington.

April 9, 1918.

General Order No. 18.

Whereas the Act of Congress approved March 21, 1918, entitled An Act to Provide for the Operation of Transportation Systems While Under Federal Control, provides (Section 10) "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President—But no process, mesne or final, shall be levied against any property under such Federal control;" and

Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundred of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs.

229 It is therefore ordered, That all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

W. G. McADOO,

Director General of Railroads.

DEFENDANT'S EXHIBIT I.

United States Railroad Administration.

Office of the Director General, Washington.

April 18th, 1918.

General Order No. 18-A.

General Order No. 18 issued April 9, 1918, is hereby amended to read as follows:

"It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the

plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

W. G. McADOO,

Director General of Railroads.

230

Assignment of Errors.

United States District Court, Southern District of New York.

ANTONI SZARY, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

Comes now the defendant, Erie Railroad Company, by its attorneys, Stetson, Jennings & Russell, and says that in the proceedings, record and judgment in the said cause there are manifest errors, and said defendant makes and files this assignment of the errors.

First. The Court erred in overruling and denying the defendant's motion to dismiss the complaint made by counsel for the defendant at the close of the plaintiff's case, to which exception was duly taken, as follows:

"Mr. von Bernuth: I move to dismiss the complaint on each and all of the following grounds:

First. The plaintiff has failed to prove the cause of action against the defendant.

Second. The plaintiff has failed to prove the cause of action alleged in the complaint.

Third. The accident happened solely because of the contributory negligence of the plaintiff.

Fourth. The accident happened as the result of one of the risks of the plaintiff's employment which were assumed by him.

231 Fifth. The plaintiff was not engaged in interstate commerce of the defendant within the meaning of the Federal Employers' Liability Act.

Sixth. This Court has no jurisdiction of the action, under the proclamation of the President with respect to railroads dated December 26, 1917, and the orders of the Director-General of Railroads No. 18 and 18a made pursuant to said proclamation.

The Court: This is the case in which Judge Knox decided the Court had jurisdiction.

Mr. von Bernuth. Yes, sir, but it ought to appear on the record here.

Mr. Robinson: Let it appear, then, on the record that, that matter has already been presented to Judge Knox and he has ruled against the defendant, holding that the case is properly here, and denied the motion to dismiss.

Mr. von Bernuth: I renew the motion, if your Honor please, with respect to that particular ground. I certainly press the motion with respect to other grounds that I have mentioned.

The Court: I think I will have to follow Judge Knox's ruling in this District Court.

"The Court: I think I will follow Judge Westenhaver and deny the motion. The other points are for the jury, negligence, and so on. I will deny the motion.

Mr. von Bernuth: I take an exception on each and all of the grounds.

Second. The Court erred in overruling and denying the defendant's renewal of the motion to dismiss the complaint made at the end of the plaintiff's case, which renewal was made at the end of the

whole case, to which exception was duly taken as follows:
232 "Mr. von Bernuth: I renew the motion to dismiss that was made on behalf of the defendant at the end of plaintiff's case on all the grounds stated in the motion at that time.

Motion denied. Exception for defendant."

Third. The Court erred in overruling and denying the motion to dismiss the complaint made by counsel for the defendant at the end of the whole case, to which exception was duly taken as follows:

"Mr. von Bernuth: I now move to dismiss the complaint, at the end of the whole case on the following grounds:

First. Plaintiff has failed to prove a cause of action against the defendant.

Second. The plaintiff has failed to prove the cause of action alleged in the complaint.

Third. The accident happened solely because of the contributory negligence of the plaintiff.

Fourth. The accident happened as a result of one — the risks of the plaintiff's employment which were assumed by him.

Fifth. The plaintiff was not engaged in the interstate commerce of the defendant within the meaning of the Federal Employers' Liability Act.

Sixth. This Court has no jurisdiction, and (or) should not proceed in this case on account of the proclamation of the President, dated December 26, 1917, with respect to the assumption of control of railroads by the United States Government, and the orders made by the Director General of Railroads, pursuant to such proclamation, and particularly also the orders known as General Orders

Nos. 18 and 18a.

233 The Court: I will deny the motion.

Mr. von Bernuth: Exception on each and all of the grounds. I would like to amend the last ground, so that it will read: 'The Court has no jurisdiction or should not proceed' instead of 'and'.

The Court: Yes."

Fourth. The Court erred in overruling and denying the following motion to set aside the verdict and for a new trial made by the defendant after the jury had brought in its verdict, to which exception was duly taken as follows:

"Mr. von Bernuth: I move to set aside the verdict and for a new trial, on the ground that the verdict is against the evidence, against the weight of evidence, contrary to law, and on all the grounds mentioned in Section 999 of the Code of Civil Procedure of New York, except that of inadequacy.

The Court: No, I think it is a question of fact for the jury. The jury's verdict I will let stand.

Mr. von Bernuth: I take an exception on all the grounds stated in my motion."

Fifth. The Court erred in giving the following charge to the jury in its main charge, to which defendant's counsel duly excepted as follows:

"The railroad company, as I have said, was engaged in interstate commerce, that is, it ran its trains between states, engaged in hauling commerce and engaged in hauling passengers. I charge you that if you find from the proof in the case that it was engaged in hauling passengers and freight between states, and that as a part of carrying on that commerce, as an instrumentality and a necessity for carrying on that commerce, it used sand in

its business and used it in the locomotives for the purpose of running and operating the locomotives safely, and if the duty of this plaintiff on this occasion required him to help in the preparation of that sand and as one of his duties at the time of the happening of this accident he was engaged in going to get a receptacle or a can used for taking ashes from a furnace or a stove which was used for heating that sand, and therefore for preparing the sand, if he was engaged in that work at the time he met with that accident and you are satisfied by the fair preponderance of the proof that the sand was used indiscriminately for interstate locomotives and intrastate locomotives, then I charge you that the plaintiff at the time of the happening of his accident was engaged in interstate commerce.

"Mr. von Bernuth: I except to that portion of your Honor's main charge where you say—I think you said it more than once—that if the jury find that sand was used indiscriminately for interstate and intrastate commerce, the jury should find that the defendant was engaged in the interstate commerce and the plaintiff comes within the Federal Employers' Act."

Sixth. The Court erred in giving the following charge to the jury in its main charge, and in submitting to the jury the question of whether plaintiff was engaged in interstate commerce, to which defendant's counsel duly excepted as follows:

"The railroad company, as I have said, was engaged in interstate commerce, that is, it ran its trains between states, engaged in hauling commerce and engaged in hauling passengers. I charge you that if you find from the proof in the case, that it was engaged in hauling passengers and freight between states, and that as part of carrying

on that commerce, as an instrumentality and a necessity for carrying on that commerce, it used sand in its business and used it in the locomotives for the purpose of running and operating the locomotives safely, and if the duty of this plaintiff on this occasion required him to help in the preparation of that sand, and as one of his duties at the time of the happening of this accident he was engaged in going to get a receptacle or a can used for taking ashes from a furnace or a stove which was used for heating that sand, and therefore for preparing the sand, if he was engaged in that work

at the time he met with that accident and you are satisfied by the fair preponderance of the proof that the sand was used indiscriminately for interstate locomotives and intrastate locomotives, then I charge you that the plaintiff at the time of the happening of this accident was engaged in interstate commerce."

"Mr. von Bernuth: I also except to your Honor's permitting the jury to pass upon the question as to whether the plaintiff was engaged or was not engaged in interstate commerce under the Federal Employers' Liability Act."

Seventh. The Court erred in giving the following charge to the jury, to which defendant's counsel duly excepted as follows:

"The Court: Any requests, Mr. Robinson?"

Mr. Robinson: I have only this, your Honor. I except to your Honor's leaving it to the jury to find, as a question of fact, whether or not the plaintiff was engaged in interstate commerce at the time of this accident. I would just like to save that exception. You do leave it to them to decide as a question of fact.

"The Court: No; I said that if the jury found that he was doing the work he claimed he was doing in his testimony at the time, that he was engaged in interstate commerce, and the further circumstance that the sand was used indiscriminately for interstate and intrastate commerce."

"Mr. von Bernuth: I except to your Honor's charge in that respect."

Eighth. The Court erred in refusing to charge the jury as requested by the counsel for the defendant, to which exception was duly taken as follows:

"Mr. von Bernuth: I ask your Honor to charge the jury that if the plaintiff was in the yard and on the tracks of the defendant at the time of the accident for the purpose of disposing, or in connection with the purpose of disposing of burned out ashes from the sand drying stoves, that he was not engaged in interstate commerce and their verdict must be for the defendant."

The Court: I do not just understand that request. I notice that here. Do you mean that if he was carrying ashes from the stove—wait a moment, do you mean that if he was carrying ashes from the stove which was used for heating the sand?

Mr. von Bernuth: Yes.

The Court: No; I refuse to charge that.

Mr. von Bernuth: I except to your Honor's refusal to charge as requested.

The Court: You do not mean by that in crossing the track. You mean just coming out and dumping the ashes?

Mr. von Bernuth: No. I do not request that. He was in the yard for the purpose, or had come into the yard for the purpose of dumping ashes from this sand drying stove into the pit. He was not engaged in interstate commerce.

The Court: I will charge that if he was doing that he cannot recover, because plaintiff's theory of recovery is different. He says he was crossing the track; he does not say he was doing that at all.

237 Mr. von Bernuth: I do not think you quite understand me. I merely mean the general purpose for which the plaintiff went into the yard of the defendant at that time, that that does not constitute interstate commerce.

The Court: I will refuse to charge except as I have already charged on that point.

Mr. von Bernuth: I except to your Honor's refusal to charge."

Ninth. The Court erred in giving the following charge to the jury in its main charge, to which defendant's counsel duly excepted as follows:

"Now, the railroad company lawfully maintained these tracks. It had the right and its employees had the right to pass up and down on that track, and if this was the way provided for the plaintiff to pass to and from this sand house, or to go to a place where this receptacle was placed, and that was the one safe way for him to go, he had a right, of course to cross the railroad tracks. With each having the right to pass at the point of collision, where the engine collided with the plaintiff, then we have the inquiry of the respective rights and the respective duties and obligations, first of the railroad employees handling the engine on the occasion and at the time in question, and the rights and the obligations and the duties on the part of the plaintiff in passing over the railroad track."

"Mr. von Bernuth: I except to that portion of your Honor's main charge where you say, in substance, that the employees were permitted to walk along the tracks and that the plaintiff had the right to cross the track at the point of collision in view of the situation."

Tenth. The Court erred in refusing to charge the jury as requested by counsel for the defendant, to which exception was duly taken as follows:

238 "Mr. von Bernuth: I ask your Honor to charge that the testimony of the plaintiff's witness, Kishkel, to the effect that he did not hear the whistle or bell of the engine which struck the plaintiff is of no avail and must be disregarded, in view of the fact that he testified that he was not listening for such bell or whistle, as against the positive affirmative testimony of witnesses to the effect that such bell was rung and such whistle was blown.

The Court: I leave that to the jury to determine on the instructions already given.

Mr. von Bernuth: I except to your Honor's refusal to charge as requested."

Eleventh. The Court erred in awarding and entering judgment in favor of the plaintiff and against the defendant, and in not awarding and entering judgment in favor of the defendant and against the plaintiff.

Wherefore, the said Erie Railroad Company, the defendant herein, prays that the judgment entered in this cause in the office of the Clerk of the United States District Court, for the Southern District of New York, on the 22 day of May, 1918, be reversed, and that the said

District Court be directed to grant a new trial of said cause and for such other and further relief as may be proper.

Dated, New York, July 23, 1918.

STETSON, JENNINGS & RUSSELL,

*Attorneys for Defendant, 15 Broad
Street, New York City, N. Y.*

239

Citation.

By the Honorable John C. Knox, one of the judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Antoni Szary, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and circuit above named, on the 18th day of September, 1918, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein Antoni Szary is defendant in error and plaintiff below and Erie Railroad Company is plaintiff in error and defendant below to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 19th day of August, in the year of our Lord One thousand nine hundred and eighteen, and of the independence of the United States the One hundred and forty-third.

JNO. C. KNOX,

*Judge of the District Court of the United States for the
Southern District of New York, in the Second Circuit.*

240

Clerk's Certificate.

UNITED STATES OF AMERICA,
Southern District of New York:

ANTONI SZARY, Plaintiff,

against

ERIE RAILROAD COMPANY, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the City of New York, in the Southern District

of New York, this 13 day of November in the year of our Lord one thousand nine hundred and eighteen and of the independence of the said United States the one hundred and forty-third.

ALEX GILCHRIST, JR.,
Clerk.

241 *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

ANTONI SZARY, Plaintiff,
against

ERIE RAILROAD COMPANY, Defendant.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, November 6, 1918.

STETSON, JENNINGS & RUSSELL,
Attorneys for Plaintiff (Defendant in Error).
STEPHEN A. MACHINSKI,
Attorney for Defendant (Plaintiff in Error).

242 United States Circuit Court of Appeals for the Second District.

ERIE RAILROAD COMPANY, Plaintiff-in-Error,
against

ANTONI SZARY, Defendant-in-Error.

Before Rogers and Hough, Circuit Judges, and Learned Hand,
District Judge.

Stetson, Jennings & Russell, Attorneys for Plaintiff-in-Error; William C. Cannon, R. L. von Bernuth, Coulter D. Young, of Counsel.
John C. Robinson, Counsel for Defendant-in-Error.

This cause comes here on writ of error to the United States District Court for the Southern District of New York.

The action is brought under the Federal Employers' Liability Act, being Chapter 149 of the Laws of 1908 amended on April 5, 1910.

The defendant-in-error who was plaintiff below is hereinafter referred to as plaintiff. The plaintiff-in-error, defendant below, is hereinafter referred to as defendant.

The facts appear in the opinion.

243 ROGERS, *Circuit Judge.*

This is a personal injury case in which the plaintiff has obtained a verdict for \$20,000 for the loss of a leg, which resulted from injuries

he received while employed by the defendant in its yards at Jersey City. The case has been brought to this court on the theory that the plaintiff was not at the time of his injury engaged in interstate commerce and so was not entitled to maintain the action under the Federal Employers' Liability Act.

It appears that plaintiff was employed as an engine sander. He prepared the sand to be used and placed it in the engines that came into the defendant's yard and which needed it, whether such engine were engaged in interstate or intrastate commerce. An engine of ordinary size would carry about 30 pails of sand. This sand the engines had to use in order to go up grade or over slippery tracks. In doing this work two other men were associated with the plaintiff in his task. They did their work of preparing the sand in what is called "the sand house," a small structure standing in the yards and alongside the tracks. The sand was brought into the yard by cars every Sunday morning and a Browning hoist lifted it from the cars into a sand bin. The plaintiff and his associates would get the sand from the bin into which it had been shoveled by a big steam shovel. The work consisted in drying the sand in four big stoves built for the purpose and which were surrounded with what are described as "big covers" into which the sand is shoveled and from which as it
244 dries the sand gradually drops out onto the ground. The stoves are heated with soft coal and it was in line with the plaintiff's general work to supply the coal to the stoves, and to remove the ashes of the burned coal. These ashes he or his associates would take out of the stoves and carry some little distance from the sand house to what was known as an ash pit some 30 feet distant where they were dumped. And to reach the ash pit it was necessary to cross some of the tracks.

On the night of the accident, January 5, 1917, the plaintiff began his usual work at 6 P. M. and put the sand into about seven engines, which he said were going to other States. He sanded the last engine that night at 9 o'clock and the accident happened half an hour thereafter. After sanding his last engine he took the ashes out of the stove and carried them over to the ash pit in a pail, according to his custom, and in doing so had to cross one of the tracks. He dumped his pail and left it on the ground while he went to the engine room to get a drink of water and in doing so he was compelled to cross a track. And having obtained a drink he started back to cross the track to get his pail, and in attempting to cross the track he was hit by an engine. He had looked but saw no engine and heard no signal. The night he described as "very dark and very foggy and rainy and misty." The plaintiff testified that at the time he could not see any-
245 thing. The steam and smoke from the engines in all parts of the yard were so thick that he could see nothing. The engine that hit him was running backwards and without a light. He was picked up and carried to a hospital and his left leg was amputated the same night being removed from two to three inches below the knee.

The question presented is whether the plaintiff at the time of his injury was engaged in interstate commerce.

It will be conceded we suppose that workmen engaged in bolting timbers into a bridge which is a part of the line of an interstate railroad are engaged in the work of interstate commerce. And if timbers have been delivered at the bridge which the men are actually engaged in shortening, narrowing and thinning to make them fit the places into which they are to be bolted such preparatory acts so far partake of the character of the final act of bolting that if an accident happens to the men while so employed it should be held that they were at the time engaged in interstate commerce. And if after the work of shortening, narrowing and thinning is done the men collect the rubbish they have made and remove it to a dump that act is so connected and related to the other that if they are injured while so engaged they would be entitled, as it seems to the writer, to recover under the Federal Employers' Liability Act. The writer is also unable to distinguish such a case from the case now under consideration. The act of sanding the locomotive is an act done in interstate commerce. The act of drying the sand in the stoves performed by the same man who sands the engines and in preparation for that act is as much related to it and as much partakes of its character as does the act of preparing the timbers to be placed in the bridge. And the act of removing the ashes is not distinguishable from the act of removing the rubbish in the case above mentioned.

It appears that after the plaintiff had dried the sand in the stove he sieved it and took it out of the sand house which was a diminutive structure, a small shed, and put it into bins in a little shed next to the sand house from which he would take it during the day and night when he filled the sand bin in the engines. To speak of sand in these bins as being in storage when it was used up in twenty-four hours is a rather exaggerated use of the term. For each night the plaintiff had ready a new supply of the sand, and whether the sand after being heated and sieved was permitted to lie on the floor of the sand house or for convenience was put in a bin in an adjoining shed is a matter of no consequence. The amount of sand needed every twenty-four hours by the large number of engines coming into the defendant's yards at Jersey City was so great as to keep three men busy each day in providing it, and as each day's demand exhausted each day's supply to claim that the sand was in storage is wholly unwarranted and without significance.

247 In *Guida v. Pennsylvania Railroad Company*, 183 A. D. 822, (July 1918) the Appellate Division of the Supreme Court of New York held that where a railroad company maintained boilers at Long Island Station, Long Island City, the State of New York, in which it produced steam necessary to operate electricity producing machinery, from which it supplied power to both intrastate and interstate trains, such boilers are indispensable instrumentalities of interstate commerce, and a common laborer killed while removing soot from one of the boilers was killed in interstate commerce within the meaning of the Federal Employers' Liability Act and hence his representative was not entitled to an award under the Workmen's Compensation Law of the State of New York. There were 36 boilers at the plant. Not all of the boilers were in use at any

one time, but it was customary and necessary after a boiler had been in operation for 6 or 8 weeks to shut it down for the purpose of removing the soot from it and making needed repairs. At the time of the accident 12 of the 36 boilers had been temporarily withdrawn from service in order that they might be freed from soot and repaired. The deceased was within one of the idle boilers engaged in the regular course of his employment of removing soot from the boiler when hot soot fell upon him and so badly burned him as to cause his death. The court held that the boiler plant was an instrumentality of commerce, along with the dynamos which generated the electric
 248 current, and the engines by means of which the current was made of service. The court added:

"The twelve boilers which were temporarily idle were an indispensable part of the boiler plant, as it was only freeing them of soot and making the necessary repairs, which could be made only when the boilers had been temporarily withdrawn from active service, later substituting them for twelve boilers then in use, that the efficiency of the plant could be maintained, and the transportation system operated. Freeing the boilers of soot was as necessary to make them effective as making needed repairs. The deceased was, therefore, injured while engaged in restoring to efficiency one of the units of an indispensable instrumentality of interstate commerce. He was employed in interstate commerce equally with the employee who was carrying bolts with which to repair the bridge and the employee who was tamping the ties."

The case was carried to the New York Court of Appeals which affirmed it without opinion, 224 N. Y. 174 (November 1918).

In *Grybowski v. Erie Railroad Company* 88 N. J. L. 1 (1915) the Supreme Court of New Jersey held that a person employed by a railroad company in cleaning out an ash pit under a track into which locomotives employed in both interstate and intrastate commerce dumped ashes, was engaged in interstate commerce, as the keeping of the ash pit clean was required by both kinds of commerce, and entitled to maintain an action under the Federal Employers' Liability Act. Chief-Justice Gummere writing for the court said:

"The proofs show that the ash pit was a part of the plant of the defendant company, that it was a necessary part of that plant, and that it was used both in interstate and intrastate commerce. The keeping of it clean, and thereby maintaining its effectiveness, was required equally for both kinds of commerce, just as the keeping in
 249 repair of tracks or bridges which are used for both kinds of commerce is a necessary incident to each of them."

The court thought the *Pedersen* case was controlling. The case was carried to the Court of Errors and Appeals and was affirmed upon the reasons stated in the opinion below twelve judges voting for affirmance and none for reversal.

I am unable to see how, if the cases cited were correctly decided, this court can hold that the plaintiff herein is not entitled to maintain this action. The stove in which the sand was dried was an instrumentality of interstate commerce and an essential part of de-

defendant's plant, and no sufficient distinction favorable to the defendant can, in my opinion, be made between cleaning out the soot from the boilers in the New York case and the removal of the ashes from the ash pit into which they were dumped by engines used in interstate and intrastate commerce in the New Jersey case on the one hand and the removal in the instant case on the other of the ashes arising from the drying of the sand. The man who dried the sand was the very man who sanded the engines. The man who removed the soot from the boilers is not shown to have had any other connection with the direct operation of the trains and the same may be said as to the man who removed the ashes from the ash pit.

My associates agree that this case must be affirmed because in their opinion it is not distinguishable from the case of *Erie Railroad v. Collins* decided at this term, when the court was differently constituted and which is not yet reported.

250 It is said that this case and the *Collins* case are not distinguishable in principle from the *Harrington* case. In the *Collins* case this court expressed its understanding of that case and it is not necessary to repeat now what was there said.

Judgment affirmed.

251 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. *Erie Railroad Company*, Plaintiff-in-Error, against *Antoni Szary*, Defendant-in-Error. (Copy.) Opinion. Rogers, Circuit Judge.

252 United States Circuit Court of Appeals for the Second Circuit.

ERIE RAILROAD COMPANY

against

ANTONI SZARY.

Before Rogers and Hough, Circuit Judges, and Learned Hand, District Judge.

LEARNED HAND, *D. J.* (concurring) :

The case of *Collins v. Erie Railroad Company* is in my judgment quite indistinguishable from the case at bar. It was argued earlier than this case before a court differently organized and was in fact decided earlier, though the decision had not been handed down. It seems to me that it should control here and I agree to affirm upon its authority. As a matter of first impression I confess I should have thought both cases within the doctrine of *C. B. & Q. R. R. Co. v. Harrington*, 241 U. S. 177.

HOUGH, *C. J.* :

I agree to affirmance for the reasons above stated. Judge Hand's memorandum also sufficiently indicates the ground of my dissent in the *Collins* case.

253 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Erie Railroad Company, Plaintiff-in-Error, against Antoni Szary, Defendant-in-Error. (Copy.) Concurring Memorandum. Learned Hand, D. J.

254 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit. Held at the Court-rooms, in the Post Office Building, in the City of New York, on the 13th Day of February, One Thousand Nine Hundred and Nineteen.

Present: Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges; Hon. Learned Hand, District Judge.

ERIE RAILROAD COMPANY, Plaintiff in Error,

v.

ANTONI SZARY, Defendant in Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On Consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R.

C. M. H.

255 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Erie R. R. Co. v. A. Szary. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 13, 1919. William Parkin, Clerk.

256 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 255 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Erie Railroad Company, against Antoni Szary as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of March in

the year of our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the said United States the One Hundred and forty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

257 UNITED STATES OF AMERICA, *vs.*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Erie Railroad Company is plaintiff in error, and Antoni Szary is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court

of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-third day of May, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

259 [Endorsed:] File No. 27,072. Supreme Court of the United States. No. 986, October Term, 1918. Erie Railroad Company vs. Antoni Szary. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed May 29, 1919. William Parkin, Clerk.

250 United States Circuit Court of Appeals for the Second Circuit.

ERIE RAILROAD COMPANY, Plaintiff-in-Error,
against

ANTONI SZARY, Defendant-in-Error.

It is hereby stipulated that the certified copy of the transcript of record herein now on file in the office of the Clerk of the Supreme Court of the United States, may be taken as a return to the Writ of

Certiorari issued by the Supreme Court of the United States to this Court on the 23rd day of May, 1919.

STETSON, JENNINGS & RUSSELL,

Attorneys for Plaintiff-in-Error.

STEPHEN A. MACHCINSKI,

Attorneys for Defendant-in-Error.

251 To the Honorable the Supreme Court of the United States,
Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to writ of certiorari herein.

Dated, New York, May 29th, 1919.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,

*Clerk of the United States Circuit Court
of Appeals for the Second Circuit.*

252 [Endorsed:] 986. 27072. United States Circuit Court of
Appeals, Second Circuit. Erie R. R. Co. v. Antoni Szary.
Return to certiorari.

263 [Endorsed:] File No. 27,072. Supreme Court U. S., Oc-
tober Term, 1918. Term No. 986. Erie Railroad Company,
petitioner, vs. Antoni Szary. Writ of certiorari and return. Filed
June 5, 1919.

Office Supreme Court, U. S.
FILED

APR 21 1919

No. 986355 JAMES D. MAHER
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Supreme Court of the United States

OCTOBER TERM, 1918.

ERIE RAILROAD COMPANY,
Petitioner,

against

ANTONI SZARY,
Respondent.

**PETITION AND MOTION, WITH NOTICE,
FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE SECOND CIRCUIT, AND
BRIEF IN SUPPORT THEREOF.**

STETSON, JENNINGS & RUSSELL,
Attorneys for Petitioner.

WILLIAM C. CANNON,
Of Counsel.



Supreme Court of the United States

OCTOBER TERM, 1918.

ERIE RAILROAD COMPANY,
Petitioner,

against

ANTONI SZARY,
Respondent.

ANTONI SZARY, respondent, is hereby notified that the Erie Railroad Company, petitioner, will, on the 5th day of May, 1919, upon its petition and a copy of the entire record in the case, upon the opening of court on that day, or as soon thereafter as counsel can be heard, submit a motion, copy of which and of the petition for writ of *certiorari* and brief in support thereof, is herewith delivered to you, to the Supreme Court of the United States in its courtroom at the Capitol in the City of Washington, D. C.

WILLIAM C. CANNON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

ERIE RAILROAD COMPANY,
Petitioner,

against

ANTONI SZARY,
Respondent.

Comes now Erie Railroad Company by William C. Cannon, its counsel, and moves this Honorable Court that it shall upon *certiorari*, or other proper process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit, require said court to certify to this court for its review and determination a certain cause in said Circuit Court of Appeals lately pending wherein the respondent, Antoni Szary, was defendant-in-error, and your petitioner, Erie Railroad Company, was plaintiff-in-error, and to that end it now tenders herewith its petition and brief and a certified copy of the entire record in such cause in said Circuit Court of Appeals.

WILLIAM C. CANNON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

ERIE RAILROAD COMPANY,
Petitioner,

against

ANTONI SZARY,
Respondent.

TO THE HONORABLE SUPREME COURT OF THE
UNITED STATES:

The petition of Erie Railroad Company respectfully shows to this Honorable Court as follows:

Antoni Szary brought this action based on the Federal Employers' Liability Act to recover against Erie Railroad Company for personal injuries. We shall hereafter refer to Antoni Szary as the plaintiff, and Erie Railroad Company as the defendant.

The plaintiff recovered a verdict for Twenty thousand dollars (\$20,000) in the United States District Court for the Southern District of New York, in a trial before Circuit Judge Manton, sitting as a District Judge. The defendant obtained a writ of error from the Circuit Court of Appeals for the Second Circuit, assigning as error that the plaintiff was not engaged in interstate commerce at the time of the accident.

Judgment on the verdict was affirmed, the opinion of the Circuit Court of Appeals being written by Judge Rogers. In a concurring opinion,

Judges Hough and Learned Hand stated that if the case were of first impression in the Second Circuit they would have held that the plaintiff was not employed in interstate commerce, following the decision of this Honorable Court in *Chicago, B. & Q. R. R. Co. v. Harrington*, 241 U. S. 177. They concurred only because they felt bound by the recent earlier decision of their own Court, when composed of Judges Rogers, Hough and Manton, in *Collins v. Erie R. Co.* from which Judge Hough had dissented. A petition for a writ of *certiorari* in this latter case is being presented at the same time with your petitioner's application.

The law for this circuit as determined in the *Collins* case and applied in your petitioner's case has thus been established by two of the four judges who heard the cases against the strongly expressed opinions of the other two.

Moreover, as hereinafter more fully appears, the decisions in these two cases present a clear cut diversity of opinion with the Circuit Court of Appeals for the Fourth Circuit, which held the Federal Act inapplicable to similar cases in the case of *Southern Ry. Co. v. Pitchford*, 253 Fed. Rep. 737, and *O'Dell v. Southern Railway*, 252 Fed. Rep. 540, affirming 248 Fed. Rep. 345.

Decisions of the State Courts on the matter are also in conflict.

The facts in your petitioner's case are these: The plaintiff was employed in the defendant's yards at Jersey City as a sand-drier, his duties being to take rough sand from a storage bin, dry it in a stove which he tended, screen the dried sand and place it in another storage bin from

which he and fellow workmen supplied locomotives engaged in both interstate and exclusively intrastate commerce as needed (fols. 69, 71, 72, 77, 78, 84, 87, 92, 93, 124, 247).

On the night of the accident the plaintiff came on duty at six o'clock. After coming on duty he supplied sand to seven engines, the last engine having been supplied at nine o'clock. The plaintiff received his injury about half an hour later (fol. 96). After supplying this engine with sand he cleaned out the stove, placed the ashes in a pail, went out of the sand house and crossed over to the ash pit where he dumped the ashes and left the pail. He then re-crossed the tracks and went to the engine room, some little distance from the ash pit, where he obtained a drink of water (fols. 96, 99, 100).

After getting a drink of water he came out of the engine room to go over to the ash pit for the pail which he had left there (fol. 102). According to his testimony he stepped out of the engine room, looked around and saw no engine approaching, nor did he hear any engine approaching "because further on there was a lot of engines moving and there was a lot of noise" (fol. 111). He walked along the track, then went to cross over and had moved about two feet upon the track when an engine struck him, running over him and causing the injuries complained of (fols. 111, 112). There were no eye-witnesses to the accident. There was no proof as to the character of the engine that the plaintiff had sanded prior to the accident, except his general statement that he had sanded engines going to "Chicago and to Philadelphia and to other states" (fol. 95), and there was no proof as to what engines he would

have sanded, if any, had the accident not intervened.

On these facts the defendant unsuccessfully contended that the plaintiff's immediate duty at the time of his injury was not interstate commerce within the meaning of the Federal Employers' Liability Act.

The Circuit Court of Appeals relied upon its opinion in the *Collins* case above mentioned, and held in effect that the rule of this Honorable Court in *Pedersen v. Delaware L. & W. R. Co.*, 229 U. S. 146 should be extended to cover this case. But the scope of that decision far from being extended has been limited by a long line of cases to the exact facts therein presented, namely, "repairs upon a road permanently devoted to commerce among the states" (*Minneapolis & St. Louis R. Co. v. Winters*, 242 U. S. 353, 356). See *Lehigh Valley R. R. Co. v. Barlow*, 244 U. S., 183; *D. L. & W. R. R. Co. v. Yurkonis*, 238 U. S. 439; *Shanks v. D. L. & W. R. R. Co.*, 239 U. S. 556; *Hudson & M. R. Co. v. Iorio*, 239 Fed. 855; *C. B. & Q. R. R. Co. v. Harrington*, 241 U. S. 177; *Ill. Central R. R. Co. v. Cousins*, 241 U. S. 641, reversing 126 Minn. 172, 148 N. W. 58; *Minn. & St. L. R. R. Co. v. Nash*, 242 U. S. 619; *B. & O. R. R. Co. v. Branson*, 242 U. S. 623

In the *Collins* case, which controlled the Court in the case at bar, the plaintiff was held to have been engaged in interstate commerce while he was adjusting a gasoline engine which was used to pump water into a tank from which it was drawn for use by interstate and intrastate locomotives. The doubtful applicability of the Federal Act to these facts was first indicated by the District Court before whom the case was heard upon de-

murrer, stating: " * * * I am almost persuaded that this case falls within the principle of those cases especially the *Harrington*, *Yurkonis* and *Iorio* cases, and that at the time of receiving the injury the plaintiff was not engaged in interstate commerce so as to give him the right to invoke the Federal Employers' Liability Act." 245 Fed. Rep. 811.

The case at bar and the *Collins* case involve the applicability of the Federal Act to railroad employees while engaged in operating or caring for a fixture used by the railroad company in preparing material for storage after which the material was supplied as occasion required to engines engaged in intrastate commerce as well as in interstate commerce, and such employment is analogous to various other acts of railroad employees as to which the decisions of this Court are not conclusive.

Although the decisions of this Court, such as the *Shanks*, *Cousins* and the *Harrington* cases, would seem to indicate that the statute is not applicable to such facts, there is an absolute difference of opinion among the Judges who have passed upon this case and the *Collins* case, and this diversity of opinion is typical of the many conflicting decisions in the federal courts and in the state courts which have been made since the foregoing and other decisions of this Court were rendered.

On facts parallel to your petitioner's case the Circuit Court of Appeals for the Fourth Circuit has held that the Federal Act was inapplicable. *Southern Ry. v. Pitchford*, 253 Fed. 736. The Court said:

"Plaintiff was a regular employe on the yard, known as a car cleaner, his duties

being to clear the yard of papers and other refuse, and clean and ice cars both interstate and intrastate. Every morning a delivery of several thousand pounds of ice was made at the yard. When the ice wagon arrived in response to the call "ice," the plaintiff and other yard employes were required to go to the chute through which the ice came from the wagons to the yard. Their duty was to put a push car on the track, put the ice on, push it to an ice box, and place the ice in the box. It was from this box that plaintiff in the course of his employment took the ice and put it on the cars as it was needed.

On May 21, 1915, plaintiff had finished cleaning a car, and had started on the work of cleaning up the yard, when he heard the call, "Pitchford, the ice is here." In response to the call, he went to the push car to aid in putting it on the track. While waiting by the belt line track for other employes to arrive, he turned to look at an engine approaching on the main track. At that instant, he was struck by a switch engine running rapidly on the belt line track.

But for the accident, the plaintiff with other employes, would have placed the push car on the track, received the ice from the wagons through the chute, pushed the car to the ice box, and removed the ice from the car to the box. After this the plaintiff in the usual course of his employment would have iced from the box cars to be attached to both interstate and intrastate trains. The cars that he would in due course have first iced would have been cars to be used in interstate transportation. Application to these facts of the decisions of the Supreme Court leaves no escape from the conclusion that the plaintiff was not engaged in interstate commerce at the time of the injury, and therefore could not recover under the federal statute.

The familiar test is: Was the employe at the time of injury employed in interstate transportation, or in a work so closely related to it as to be practically a part of it? *Shanks v. Delaware, L. & W. R.*, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797.

It is immaterial that the plaintiff's last previous work may have been cleaning an interstate car, or that his next work would certainly have been icing an interstate car from the ice box. *Illinois Cent. R. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051. Ann. Cas. 1914C, 163; *Erie R. Co. v. Welsh*, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319; *Delaware L. & W. R. v. Yurkonis*, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397. He had entered upon the work of receiving ice from the chute and transporting it to an ice box. This work was too remote from interstate commerce to be regarded a part of it. *Chicago, B. & Q. R. R. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941."

In your petitioner's case the line of recent authorities here cited and followed was rejected in favor of a return to the *Pedersen* case. Furthermore, the decisions in the petitioner's and *Collins* cases are inconsistent with a decision of the lower Court made in 1917, *H. & M. R. R. v. Iorio*, 239 Fed. Rep. 835, where it had been held that handling rails before being placed in the roadbed was not interstate commerce.

The same question has also come before the United States District Court for the Northern District of Ohio, which held the Federal Act applicable to an employee who was at work in a tank from which water was furnished to locomotives engaged in both interstate and exclusively intrastate commerce. *Roush v. Baltimore & Ohio*

R. Co., 243 Fed Rep. 712. The Trial Court in petitioner's case relied upon the *Roush* decision in holding that the evidence was sufficient to show that plaintiff was engaged in interstate commerce (fols. 74, 230, 240). But in the *Roush* case the Court acknowledged the prevailing diversity of opinion (page 713) :

"The several State Courts of last resort and the Federal Courts inferior to the United States Supreme Court have differed widely in similar cases and *authority may be found supporting either side of the case.*"

The work of handling material before its use is of course the same as work upon such material after it has been used, and in the latter cases, the same diversity of decision exists. In two cases where the plaintiff was injured while removing ashes from a pit where they had been deposited from both interstate and intrastate locomotives, the Federal Act was applied by the New Jersey courts, *Grybowski v. Erie R. Co.*, 88 N. J. Law. 1, while its applicability was denied by the Circuit Court of Appeals for the Fourth Circuit, *O'Dell v. Southern Ry.*, 252 Fed. Rep. 540, affirming 248 Fed. Rep. 345. The *Grybowski* case was cited and relied upon by the Circuit Court of Appeals in the case at bar.

The conflicting opinions already cited are sufficient to show the confused state of the law as applied to a class of cases where the employee is injured while engaged in handling material, or operating fixtures in the preparation or obtaining of such material, which theretofore had been or thereafter were used in aid of interstate or of intrastate commerce.

Your petitioner's case and the *Collins* case which are here together, present facts typical of this class of cases. The decisions have left a borderland between the *Pedersen* case and the opinions limiting it, in which not only courts, but as in the Second Circuit, the members of a single court, are equally divided in opinion. Litigation has depended for its outcome not only on the jurisdiction in which it happened to be started, but in this Circuit, at least, on the constitution of the court which happened to hear it.

In view of this confusion, it must follow that the decisions heretofore rendered by this Court are not parallel to the present case and the other cases of which it is a type, and are not so similar in principle as to determine the law for the lower courts which are daily called upon to adjudge such cases, and it is respectfully submitted that by granting this petition, an opportunity will be offered to clarify the law as well as to remove an incentive to litigation which promises to increase the existing confusion.

A proper and uniform application of this Act is of the utmost importance. The relationship between the railroads and their thousands of employees is of such a nature that a question affecting this relationship is deserving of the recognition of this Court. If this Act is being improperly applied in favor of the employees and against the railroads, or in favor of the railroads and against the employees, then this Court is warranted in considering the question and settling the manner in which this Act should be applied once and for all.

Further than this, the proper application of this Act is a matter of very considerable importance as it involves large property interests and

closely touches, in addition to the rights of employees and the railroads, the general public, who as travelers and as stockholders, are vitally interested.

Your petitioner presents herein as a part of this petition a brief showing more fully its views upon the question involved, and a certified transcript of the record of the Circuit Court of Appeals.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may issue out of and under the seal of this Court, directed to the Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court upon a day certain, to be therein designated, a full transcript of the record of all the proceedings of the said Circuit Court of Appeals in this case, which was entitled in that court "Erie Railroad Company, Plaintiff-in-Error, against Antoni Szary, Defendant-in-Error," to the end that said cause may be reviewed and determined by this Court, as required by law, and that your petitioner may have such other and further remedy in the premises as to this Court may seem appropriate, and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court.

ERIE RAILROAD COMPANY,
By WILLIAM C. CANNON,
Its Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

ERIE RAILROAD COMPANY,
Petitioner,

against

ANTONI SZARY,
Respondent.

**BRIEF ON BEHALF OF ERIE RAILROAD
COMPANY IN SUPPORT OF ITS PETI-
TION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEC-
OND CIRCUIT.**

This cause came before the Circuit Court of Appeals for the Second Circuit upon a writ of error and that court held that the respondent, Antoni Szary, was engaged in interstate commerce at the time of his injury, and affirmed the judgment of the District Court.

POINT I.

State and Federal Courts are in conflict over the application of the Federal Employers' Liability Act to facts of which this case is typical.

The plaintiff was injured while emptying ashes from a stove in which sand was dried. After being dried and sifted the sand was stored in a bin and from this bin distributed indiscriminately to locomotives engaged in interstate and exclusively intrastate commerce.

In the case of *Eric Railroad Company v. Collins*, which is also before this Honorable Court on petition for writ of *certiorari*, the plaintiff's injuries were sustained while tending a gasoline engine. The engine ran a pump which lifted water into a tank, from which it was supplied to locomotives employed, like those above mentioned, in both interstate and intrastate commerce.

Railroad yards throughout the country are equipped with fixtures like the sand drier and the water tank, in connection with which thousands of employees are employed. Injuries to these employees have been the subject of extensive litigation with results so diverse that in one case the court remarked, *Roush v. Baltimore & Ohio R. R. Co.*, 243 Fed. Rep. 712, 713:

"The several state courts of last resort and the federal courts inferior to the United States Supreme Court have differed widely in similar cases, and authority may be found supporting either side of the question."

In the *Roush* case, the fixture, as in the *Collins* case, was used in storing water for locomotives, and in each of these cases the injured employee was held to be within the Federal Employers' Liability Act.

The decisions in the *Collins* and *Roush* cases and in the case at bar are in irreconcilable conflict with two cases in the Circuit Court of Appeals for the Fourth Circuit, already discussed in the petition, in which the Federal Act was held not applicable. *Southern R. Co. v. Pitchford*, 253 Fed. Rep. 737, where the employee was placing ice in storage before its use in freight cars, and *O'Dell v. Southern Ry. Co.*, 252 Fed. Rep. 540, affirming 248 Fed. Rep. 345, where the employee was removing ashes from an ash pit where they had been deposited from locomotives.

The latter case is also of particular interest because it is directly opposed to *Grybowski v. Erie R. Co.*, 88 N. J. Law, 1, on which the court below relied in your petitioner's case.

Without any extended discussion of the opinions, the following brief statements are sufficient to show the wide diversity of opinion existing between the various State and Federal Courts in similar cases:

The employee has been held not to have been engaged in interstate commerce in the following cases:

In *Barnett v. C. & C. Ry. Co.*, 94 S. E. 150 (W. Va.) the plaintiff was injured while assisting in moving a car of lumber in car repair shops. The lumber was to be used in building and repairing cars and might have been used in building or repairing a car engaged in interstate commerce.

In *M. K. & T. Ry. Co. v. Watson*, 195 S. W. 1177 (Tex. Civ. App.) the plaintiff was injured while carrying a heavy tie from the right of way, where it had been unloaded that morning, to a stack near a tool-house from which it would be taken for use when needed.

In *Sullivan v. C. M. & St. P. Ry. Co.*, 163 Wis. 583, 158 N. W. 321, the plaintiff's decedent was killed by a fall of lumber in a storage shed. At the time of his death he was engaged in selecting lumber which was to be worked in a planing shed in the yard and then sent to a point outside the state where it was to be put into stock for repair and construction work, as needed in the operation of an interstate railway.

In *Morrison v. C. M. & St. P. R. Co.*, 175 Pac. 325 (Wash.), the plaintiff's decedent was killed while returning from work which had consisted of unloading concrete tiling to be used whenever needed for renewal of wooden culverts along the right of way. The tiling after interstate carriage had been on a blind siding three days and at the time of trial had not been used.

In *Y. & M. V. R. Co. v. Houston*, 114 Miss. 888, 75 So. 690, plaintiff was injured while pulling and blasting down sand and gravel to be loaded on cars and later used as ballast on an interstate railroad.

In *Kinzell v. C. M. & St. P. R. Co.*, 171 Pac. 1136 (Idaho) plaintiff was injured while assisting in constructing a fill which was to be used in place of a wooden trestle then in use by an interstate railroad.

In *Gallagher v. N. Y. C. R. Co.*, 222 N. Y. 649, affirming 180 App. Div. 88, writ of *certiorari* denied by this Court October 21, 1918, decedent was a railroad carpenter and at the time he met his death was engaged in repairing coal pockets from which coal was supplied to both interstate and intrastate engines as required.

The employee has been held to have been engaged in interstate commerce in the following cases:

In *C. C. L. R. Co. v. Woods*, 252 Fed. Rep. 428 (C. C. A. 4th Cir.) plaintiff was injured while operating a machine used to cut bolts and nuts in the railroad machine shop; the nut he was working on at the time of his injury had been taken from an engine in the morning and was put back in the engine in the evening of the same day, when the engine returned to its interstate commerce run.

In *Kuchenmeister vs. Los Angeles & St. L. R. Co.*, 172 Pac. 725 (Utah), where plaintiff was struck in the eye by a splint while grinding down a pin which had been taken from an engine that had come in a short time previous to the accident from its interstate work.

In *Chrosiel vs. N. Y. C. & H. R. R. Co.*, 159 N. Y. Supp. 924, decedent was a machine drill runner sent to drill holes in concrete wall being used in constructing an interstate terminal, and while drilling was killed when the scaffolding fell.

In *Collins vs. M. C. R. Co.*, 193 Mich. 303, 159 N. W. 535, plaintiff was injured while stringing

new telephone wires to connect a yard telephone system with the office at a transfer point.

In *Roush vs. B. & O. R. Co.*, 243 Fed. Rep. 712 (Dist. Ct. Ohio), the plaintiff was attempting to find the depth of water in a cistern which was part of a pumping system used to supply water to locomotives engaged in interstate and intrastate commerce. This case was one of the cases relied upon by the Circuit Court of Appeals in the *Collins* case.

See also decisions cited by the Circuit Court of Appeals in *Collins v. Erie*.

The history of a single case in the New York courts sufficiently illustrates the state of the law. *Vollmers v. N. Y. Central R. Co.*, 223 N. Y. 571, reversing 180 App. Div. 60. Vollmers was a plumber, engaged in the repair of pipes beneath a station used in both interstate and intrastate commerce. With these facts undisputed, the case was reversed at each step of its progress from the State Industrial Commission to the court of last resort, on the single question whether this constituted employment in interstate commerce. The Appellate Division reversing the Industrial Commission held that it was, citing *Pedersen v. D. L. & W. R.R.*, 229 U. S. 146. The Court of Appeals reversing the Appellate Division relied on *Shanks v. D. L. & W. R.R.*, 239 U. S. 556, and held that this employment was not interstate commerce.

Although we feel that the recent holdings of this Court point to but one view of the case at bar, still the divergence of opinions of the judges of the Court of Appeals and the conflicting decisions of other courts, indicate that this Court has

not directly decided a case where the facts are similar to those in the case at bar, or in the *Collins*, *Pitchford*, *O'Dell* or *Grybowski* cases, or so analogous as to prevent a difference of views. Because of the absence of a decision of this Court on this particular character of cases, the various Courts have rendered various and conflicting decisions based upon finely drawn distinctions and unsound premises drawn from the various decisions of this Court. This has resulted in a hopeless confusion as to whether or not the great body of railroad employees engaged in this kind of work come within the purview of this Act, and this confusion can only be removed by a decision of this Court in a case such as the one at bar.

In view of the importance of this question, and the confusion that has resulted from the uncertainty in which this matter has been left, it is proper for this Court to grant this petition allowing the writ of *certiorari*. *Joplin Mercantile Co. v. U. S.*, 236 U. S. 531, 538.

POINT II.

The decision of the Circuit Court of Appeals that the plaintiff was engaged in interstate commerce at the time of his injury is contrary to the law and should be reversed by this Court.

The plaintiff's duties as sand-drier may be considered from two points of view: (1) preparing the sand for storage, and (2) caring for the stove and fire with which the sand was prepared for storage.

1. It seems clear from the decisions of this Court that the preparation of sand for storage would not constitute interstate commerce. In *C. B. & Q. v. Harrington*, 241 U. S. 177, deceased was a member of a switching crew. At the time of the injury he was engaged in switching coal from cars on a storage track to a coal chute where it was to be placed in bins and supplied as needed to locomotives of all classes, some of which were engaged in interstate commerce and others in intrastate commerce. The Court said, p. 179:

" . . . As the question is with respect to the employment of the decedent at the time of the injury, (*Illinois Central R. R. v. Behrens*, 233 U. S. 473, 478), it is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed, or chutes, and the only ground for invoking the Federal Act is that the coal thus placed was to be used by locomotives in interstate hauls. As we have pointed out, the Federal Act speaks of interstate commerce in a practical sense suited to the occasion and 'the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.' *Shanks v. Del., Lack. & West R. R.*, 239 U. S., 556, 558, and cases there cited. *Manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place*

from which it could be taken as required for use."

If Harrington was not engaged in interstate commerce in placing coal in a bin to be used by interstate engines, how can it be said that the plaintiff was employed in such commerce when he was engaged in work which was antecedent to putting engine materials in the storage bin, viz, the work of caring for the fire which prepared the same for storage?

In the case of *Lehigh Valley R. R. vs. Barlow*, 244 U. S. 183, the plaintiff was engaged in moving cars containing supply coal to an unloading trestle, and this Court held he was not engaged in interstate commerce. This Court said:

"We think their interstate movement terminated before the cars left the sidings, and that while removing them the switching crew was not employed in interstate commerce."

In the case of *Hudson & Manhattan Railroad Co. v. Iorio*, 239 Fed. Rep. 855, decided by the Circuit Court of Appeals for the Second Circuit in 1917, the plaintiff, injured while storing rails for future use in interstate commerce, was held not engaged in interstate commerce. In this case the Court said, at page 856:

"It cannot be said that the rails which Iorio was engaged in storing against a use that was certainly not imminent, and might never occur, were at the moment engaged in, or practically part of, interstate commerce; for that commerce was going on *without any present assistance*, either from Iorio, or the rails on which he was working, or the men

who were working with him. We, therefore, hold that the actual employment or use at the moment of injury of the thing upon which the person injured was working is the test of applicability of the statute, under circumstances such as shown here."

The plaintiff in the case at bar was employed in the preparation of the sand prior to its storage. He was not as closely connected with interstate commerce as Iorio was, who was actually storing the material. The sand might never have been used for any purpose and the interstate commerce of the defendant which was going on was *without present assistance* either from the plaintiff or the sand upon which he was at work.

(2) It is also clear, we submit, that the other phase of the plaintiff's employment, tending the stove which dried the sand, did not constitute interstate commerce.

In the case of *Shanks v. Del., L. & W. R. R.*, 239 U. S., 556, the plaintiff was employed in a shop where the defendant made repairs to engines engaged in both interstate and intrastate commerce. Usually he was engaged in repairing engines, but *at the time* of his injury he was engaged solely in taking down and putting into a new location an overhead countershaft, a heavy shop fixture through which power was communicated to some of the machinery used in the repair work. This Court held that the test was whether or not the plaintiff was engaged in interstate work *at the time* of his injury and held that he was not engaged in interstate commerce. This Court said (p. 559) :

"Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation or in repairing, or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. *The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines, some of which were used in such transportation.* This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the *Yurkonis* case, was too remote from interstate transportation to be practically a part of it, and therefore he was not employed in interstate commerce within the meaning of the Employers' Liability Act."

Applying this rule to the case at bar it would seem that the nearest the plaintiff came to being engaged in interstate commerce at *the time* of his injury was in removing ashes from a *fixture*. To paraphrase the language of the *Shanks* case so as to apply it to the facts here, it is clear that the connection between the *fixture* and interstate transportation *was remote at best*, for the only function of the fixture was to convey heat to sand which was placed in storage and then used in supplying engines some of which were used in interstate transportation.

In the case of *D. L. & W. R. R. Co. v. Yurkonis*, 238 U. S. 439, the plaintiff at the time he was injured was employed by the defendant as a miner in its colliery where the defendant mined and pre-

pared anthracite coal for use in its locomotives and engines and other equipment used in its business as a common carrier in interstate commerce. This Court said (page 444) :

"The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce, facts essential to recovery under the Employers' Liability Act."

In the case of *Illinois Central R. Co. v. Cousins*, 241 U. S. 641, reversing 126 Minn. 172, 148 N. W. 58, the plaintiff was wheeling coal to one of the car repair shops. The coal was intended for use in heating stoves in a shop where employees of the defendant were engaged in repairing cars. The defendant was engaged in interstate commerce as well as intrastate commerce, and many, if not all, of the cars repaired in the shop were cars that moved only in interstate commerce. The Supreme Court of Minnesota held that the plaintiff was engaged in interstate commerce. This Court, however, reversed this decision with a memorandum opinion, citing as authority the *Yurkonis* and *Shanks* cases.

The only difference between the *Cousins* case and the case at bar is that in the *Cousins* case the plaintiff was engaged in wheeling coal to a stove that heated a shop where interstate work was being done, while in the case at bar the plaintiff

was carrying ashes *from a stove* that heated sand that went into *storage* where it might be supplied to either an engine engaged in intrastate commerce or interstate commerce. In the *Cousins* case, the plaintiff was more closely connected with interstate commerce than the plaintiff here, as *Cousins* was actually taking coal to a stove in a repair shop, while the plaintiff was not taking material from or to the said house.

In the case at bar the Circuit Court of Appeals reasoned from the following attempted analogy to the facts of *Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146.

"The question presented is whether the plaintiff at the time of his injury was engaged in interstate commerce.

It will be conceded we suppose that workmen engaged in bolting timbers into a bridge which is a part of the line of an interstate railroad are engaged in the work of interstate commerce. And if timbers have been delivered at the bridge which the men are actually engaged in shortening, narrowing and thinning to make them fit the places into which they are to be bolted such preparatory acts so far partake of the character of the final act of bolting that if an accident happens to the men while so employed it should be held that they were at the time engaged in interstate commerce. And if after the work of shortening, narrowing and thinning is done the men collect the rubbish they have made and remove it to a dump that act is so connected and related to the other that if they are injured while so engaged they would be entitled, as it seems to the writer, to recover under the Federal Employers' Liability Act. The writer is also unable to distinguish such a case from the case now under consideration.

The act of sanding the locomotives is an act done in interstate commerce. The act of drying the sand in the stoves performed by the same man who sands the engines and in preparation for that act is as much related to it and as much partakes of its character as does the act of preparing the timbers to be placed in the bridge. And the act of removing the ashes is not distinguishable from the act of removing the rubbish in the case above mentioned."

It is submitted that this analogy upon which the decision rests is false. The *Pedersen* case involved "repairs upon a road permanently devoted to commerce among the states." Therefore it may be conceded that the related acts partake of an interstate character, as the court says.

But "the act of sanding locomotives" is not, as the court says it is, "an act done in interstate commerce." If the plaintiff had been injured while pouring sand, after drying, from the storage bin into a locomotive engaged in exclusively intrastate commerce, it could hardly be contended that he was at the time engaged in interstate commerce. Any of the sand which he dried might have been so used. As the use of the sand is thus undetermined until the final act appropriating it to one form of commerce or the other, it cannot be said, as in the bridge case, that all related and preliminary acts partake of an interstate character.

The same error underlies the court's attempt in the *Collins* case to distinguish the decision in *Chicago, B. & Q. R.R. Co. v. Harrington*, 241 U. S. 177. The Court said:

"At the time of his death Harrington was engaged in switching coal belonging to the

railroad company, and which had been standing on a storage track for sometime, to the coal shed, where it was to be placed in bins or chutes from which it was to be supplied as needed to locomotives of all classes whether used in interstate or intrastate traffic. The court held that Harrington while engaged in the moving of the coal from the storage tracks was not engaged in interstate commerce, and in so holding declared that the case was not distinguishable in principle from the Yurkonis case *supra*. We see no distinction between the facts in the Harrington case and the facts in the Yurkonis. In the Yurkonis case the coal in the act of being mined had not yet become an instrumentality of interstate commerce. And after coal has been mined and while it is being carried from one State into another it is in interstate commerce. It ceases to be in such commerce when it reaches its destination and is left on the storage tracks for sometime as in the Harrington case. Then the coal being out of interstate commerce does not again get into interstate commerce by the mere act of being moved from the storage tracks to another place on the tracks in front of the coal chutes. That was the act Harrington performed. The coal was still to be unloaded into the chutes and with that act Harrington was not engaged. In unloading the coal into the chute from which it was to be taken by the locomotives in interstate and intrastate commerce it became converted into an instrumentality of interstate commerce. The act of putting the coal into the chutes from which the engines can take it is an act performed in interstate commerce as much so as is the act of putting water into the trough by the side of the tracks to be scooped by passing engines. And we cannot distinguish the act of putting the coal into the coal chutes for

the supply of the engines from the act of putting rails alongside of a track into which they are to be fitted or the bolts by the side of the bridge as in the Pederson case."

The Court seems to have overlooked that the very case which it supposes of putting rails alongside of a track came before this same Circuit Court of Appeals in 1917, and was decided not to be interstate commerce within the Federal Employers' Liability Act. *Hudson & M. R. Co. v. Iorio*, 239 Fed. Rep. 855.

The distinction which the Court seeks in the last sentence above quoted is this: the bolts beside the bridge are appropriated to use in the maintenance of a road permanently devoted to commerce among the states.

When coal passes into a chute serving indiscriminately interstate and intrastate locomotives, it is no more appropriated to an interstate use than it was before. The test was stated by this Court in *M. & St. L. R. Co. v. Winters*, 242 U. S. 353:

"Its character as an instrument of commerce depended upon its employment at the time, not upon remote possibilities or upon accidental later events."

Coal in the chutes may be physically closer to its ultimate use than it was before, but the character of that use is no less a matter of "remote possibilities" and "accidental later events."

This has been recognized in the case of *Lehigh Valley R.R. Co. v. Barlow*, 244 U. S. 193. The plaintiff was engaged in actually placing supply coal on its unloading trestle, which would, we sub-

mit, be the same as placing it in coal chutes, and this Court following the decision in the *Harrington* case held he was not engaged in interstate commerce.

Furthermore this Court at the present term denied a writ of *certiorari* to review a decision of the New York Court of Appeals holding that a laborer injured while at work in coal pockets supplying both interstate and intrastate locomotives was not engaged in interstate commerce. *Gallagher v. N. Y. Central R. Co.*, 222 N. Y. 649, affirming 180 App. Div. 88, writ of *certiorari* denied Oct. 21, 1918.

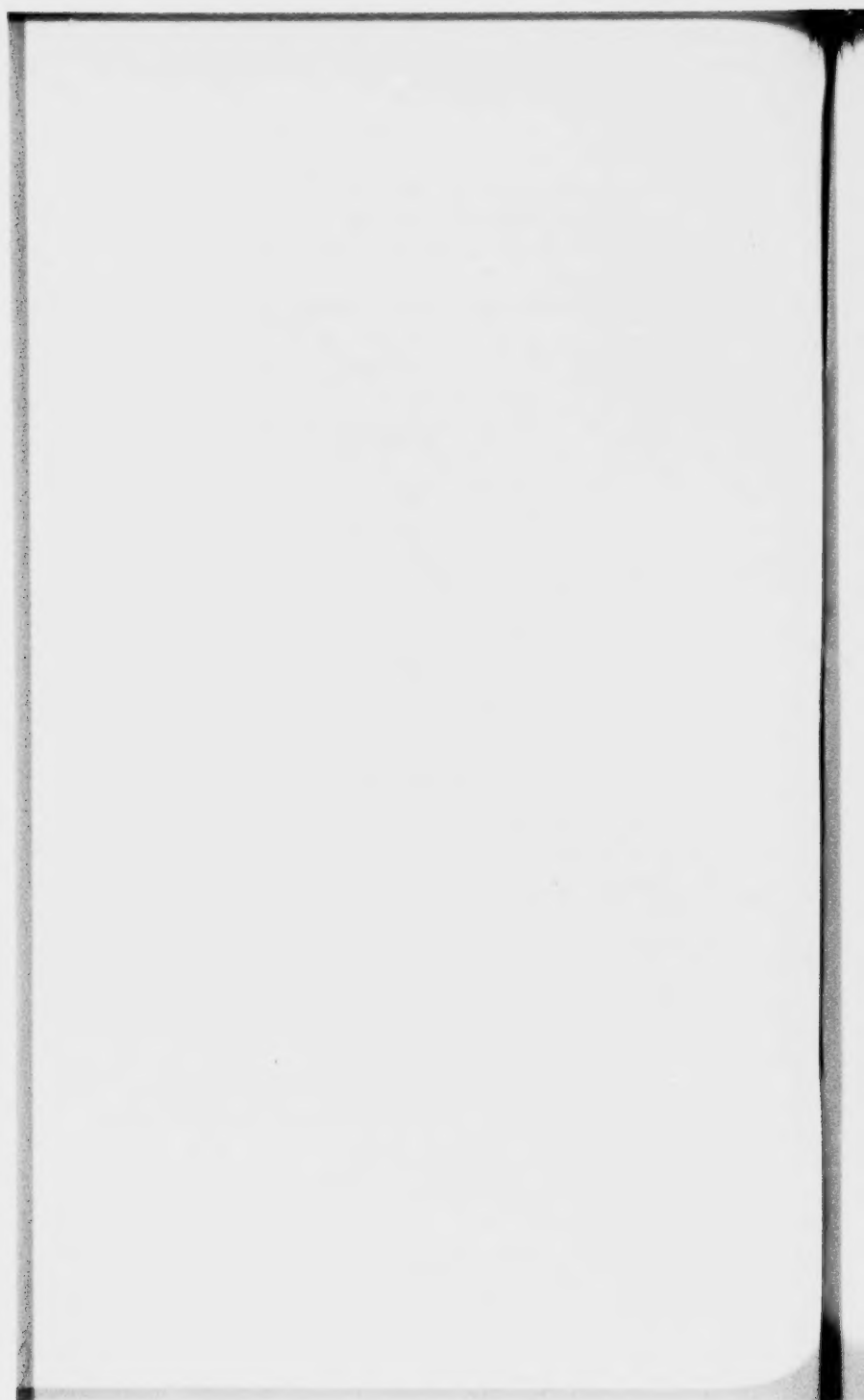
The same result was reached in *Halcy v. Boston & Albany R. Co.*, 225 N. Y., Memo. 51.

It is submitted that the decision below cannot be sustained on the reasoning attempted, and is counter to the prevailing current of authority.

CONCLUSION.

It is respectfully submitted that because of the diversity of decisions in the various federal and state courts, and because of the absence of definite ruling of this Court which will control the lower courts in like cases, the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

WILLIAM C. CANNON,
Counsel for Petitioner.



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Supreme Court of the United States

OCTOBER TERM, 1918.

ERIE RAILROAD COMPANY,
Petitioner,

against

ANTONI SZARY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

JOHN C. ROBINSON,
Counsel for Respondent.

Supreme Court of the United States

OCTOBER TERM, 1918.

ERIE RAILROAD COMPANY,
Petitioner,

against

ANTONI SZARY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

Statement of Facts.

The action is under the Federal Employers' Liability Act to recover damages for injuries sustained by Szary, who, while in the employ of the petitioner in its Jersey City yard, was run over by an engine running *detached and backward* 307-312), without any light on it (117), and without ringing its bell, or giving any warning of its approach (117, 180, 181), although the regular custom, and even the rule of the yard, required "the men on the engine, either firemen or engineers, to ring the bell as they came along that track at the particular point where Szary was run down" (291-292).

Szary's employment was the preparation of the sand which is an essential part of the equipment

of all locomotives, the placing of it in the locomotives, and the management and operation, including the cleaning of and the removal of the ashes from the "*Big stoves*" built for that purpose (52), in which the sand was heated, heating being a necessary part in the process of its preparation (50-53). The sand was used in engines engaged in both interstate and intrastate commerce.

When run over Szary was crossing the track to get a pail which he was using in connection with the work of removing the ashes from one of these "*Big stoves*" (133).

On its appeal to the Circuit Court of Appeals, the petitioner did not dispute its negligence, its *only* contention being that, at the time of his injury, Szary was not engaged in interstate commerce.

It now seeks a review of the judgment herein, because, as it alleges, "of the absence of definite ruling of this Court which will control the lower Courts in like cases."

We contend that this Court has already very definitely *held*, its latest ruling on the subject being as recent as March 3, 1919, that in cases such as the one at bar, the employee it to be regarded as being engaged in interstate commerce, and entitled to the benefits of the Federal Employers' Liability Act. (See *N. Y. Cent. R. R. v. Porter*, decided by the Court on March 3, 1919.)

POINT I.

The evidence shows, that Szary was, under the decisions of this Court, engaged in interstate commerce.

In answering paragraph "Sixth" of the complaint, which is as follows:

"That all of said times and particularly at the time and place where plaintiff was injured, defendant was a common carrier by railroad engaged in commerce between several and different States of the United States and Territories and between several and different States of the United States and foreign nations" (12),

the railroad states in paragraph II of its answer, at page 7, as follows:

"it admits that at the times mentioned in the complaint defendant was a common carrier by railroad engaged partly in commerce between the several and different states of the United States and foreign nations, and partly in commerce wholly interstate and more particularly wholly within the State of New Jersey" (20-21).

Szary's duties in connection with his employment, as testified to by himself and Webb, the engine despatcher, were not disputed.

It was uncontradicted that sand, prepared in a certain way, which includes heating it, is something that is absolutely necessary to have in any engine that is properly equipped (45). "It is for starting out of stations, it is used on rails to start

out of stations," and it is so placed in the engine that at the will of the engineer or fireman it can be dropped from the engine on the rails (44, 45). About thirty pails of this sand are placed in each engine (46).

Speaking of Szary and the nature of his employment, the engine starter testified that he prepared the sand; that in connection with this work he had to dry the sand in the stoves and to sieve it so as to take all the stones out of it; that before the sand was placed in the engines it was dried in "Big stoves" built for that purpose, (52) the stoves being heated by soft coal; that it was Szary's work to feed these stoves with both sand and fuel and that as a part of his general work *it was his duty to keep these "Big stoves" clean*; that in order to do so he was obliged to remove the ashes of the burnt coal from the stoves, take them outside the sand house to an ash pit, and dump them there; and that in order to go to and from the ash pit it was necessary for him to cross the tracks (44-57).

There was a place for the men to get their drinking water a little distance from the sand house, and it was a regular thing for Szary and the others to go there for water. "That is something they did many times in the day and night in connection with the work" (59, 60). Just before his accident, Szary had removed a pail of ashes from one of these "Big stoves" (52), taken it to the ash pit, dumped it, left the empty pail at the pit, and gone to this place, and taken a drink of water. It was while returning to the pit for the ash pail that he was struck down by the locomotive (126, 127).

He had come on duty at six o'clock p. m., and Webb saw him about that time in the sand house

"drying sand and getting ready to dry sand * * * getting things fixed up and getting their wheelbarrows in shape to wheel the sand to the fires and things like that" (61, 62).

Szary had been employed in the yard about three years (87). Speaking of his work on the night of the accident he says that he prepared the sand, sifted it and put it into seven engines which "went to Chicago, and to Philadelphia, and to other states" (94-95). Part of his work was to feed the fires and keep them burning. And it was also part of his nightly work to clean out the stoves, remove the ashes from them when the fires were burnt out, carry them to the ash pits and dump them there (88-95).

Q. * * * It was a part of your work to feed these fires and keep them burning, was it not? A. Yes.

Q. And also a part of your nightly work to *clean out the ashes when the fire was burned out*, was it not? A. Yes.

Q. And a part of your nightly duty is to *take the ashes from the stove and carry them to what were known as the ash pits*, is that not so? A. Yes" (92-95).

In describing the accident Szary says that after he fed the last engine with sand he cleaned out the "Big stove" (52) and took the ashes from it over to the ash pit in a pail. In order to do this it was necessary for him to cross the railroad track (282-284). "I could not get there any other way but to cross the tracks" (96-99).

When he got to the ash pit, he dumped the ashes, and then went "to the engine room, where the drinking water was" (100) to get a drink. After getting it he started to go back to the ash pit for the ash pail, and it was while recrossing the railroad track that he was run over (100-105).

Webb, speaking of the sand says: "They daily dry it and use it on the engines" (247); that the sand was originally brought into the yards and passed along to Szary and the men in the sand house to work upon it, and that it was their work that got the sand ready for, and actually placed it in, the engines. That in addition he "*had to take care of the fires*" (283) and *take the ashes out of the stove and carry them across the tracks, to the ash pit* (282-284).

The care, including the cleaning out, of these "**Big stoves,**" built especially "for that work, to dry sand" (52) to be used in interstate commerce was certainly employment in interstate commerce, and on an "instrumentality" of such commerce.

In *Roush vs. Baltimore & Ohio R. R. Co.*, 243 Fed., 710, 713, it was held that an employee engaged in operating a pump which furnished water indiscriminately to engines engaged in both intrastate and interstate commerce was engaged in interstate commerce within the meaning of the Act.

In *Guida v. Pennsylvania Railroad*, 183 App. Div., 822, an employee was injured while cleaning soot from a boiler in the power plant of a railroad company generating electricity for the opera-

tion of trains on one road wholly in New York State, and on another partly in New York and partly in New Jersey. It was *held* that the plaintiff came within the Federal Employers' Liability Act, the Court there saying:

"That statute speaks of interstate commerce, not in a technical legal sense, but in a practical one, making the true test of such employment whether the employee at the time of the injury was engaged in interstate transportation, or in a work so closely related to it as to be practically a part of it."

In *Sells v. Grand Trunk &c. R.*, 206 Ill. App. 45, an engineer who was injured while repairing a hoist used to fill coal boxes from which locomotives engaged in both kinds of commerce were coaled, was *held* to be within the Act (Certiorari denied by the Supreme Court).

Szary, at the very instant of his injury, was engaged in that part of his work that had to do with keeping efficient the "Big stoves" (52) in which the sand was made ready for use in interstate commerce.

These "Big stoves" (52) had nothing transitory or changing about them. "They were built for that," that is, preparing the sand to be used in interstate commerce (52).

The sand prepared in them was an absolute necessity of the railroad in the conduct of its interstate traffic. The "Big stoves" by and in which it was prepared, and through which it was continuously passing were *necessary, permanent and stationary instrumentalities of interstate com-*

merce, just as much so as were stations, tracks, round houses, road beds, switches, signal devices, pump houses, water tanks, etc.

In every case where an employee has been injured while working in connection with such instrumentalities of interstate commerce, it has been held by this Court that the employee came within the purview and fair intendment of the Federal Employers' Liability Act, even though the particular instrumentality was used for intrastate, as well as interstate, commerce.

So well is the principle established by this Court that, in a case recently before it, where the principle had been ignored by the lower Court, this Court reversed the lower Court, on the authority of its own previous decisions on the subject. Mr. Justice McReynolds delivered the opinion of the Court (March 3, 1919). It is in full as follows:

"Lewis M. Porter, a section-man, was struck and instantly killed by plaintiff in error's engine attached to a passenger train and moving along the main track. The Appellate Division affirmed an award in behalf of his widow and children under the New York Workmen's Compensation Law.

If the deceased was employed in interstate commerce when the accident occurred, consequent rights and liabilities arose under the Federal Employers' Liability Act and the State statute did not apply. *New York Central R. R. Co. v. Winfield*, 244 U. S. 147; *Erie R. R. Co. v. Winfield*, 244 U. S. 170.

The evidence showed and the State Workmen's Compensation Commission found: 'Lewis M. Porter resided at Camden, N. Y.,

and upon the date of the accident, December 17, 1914, was in the employ of The New York Central Railroad Company as a laborer. On said date, while engaged in shoveling snow upon the premises of The New York Central Railroad Company between the west bound track and a platform near the intersection of said tracks and Mexico Street in the village of Camden, he was struck by the engine of a passenger train known as train No. 49, which was proceeding northerly on the west bound track, receiving injuries from which he died immediately. The tracks of The New York Central Railroad Company at the point where the deceased was working, were used for the purpose of transporting both interstate and intrastate cars and both interstate and intrastate commerce.'

Considered in connection with our opinions in *Pederson v. Del., Lack. & West. R. R.*, 229 U. S. 146; *Southern Railway Co. v. Puckett*, 244 U. S. 571, and cases there cited, we think the circumstances here presented make it quite clear that when killed Porter was employed in interstate commerce. Accordingly, the judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

N. Y. Cent. R. R. v. Porter, No. 134, Oct. term, 1918, of this Court.

See also

Pederson v. D., L. & C. R., 229 U. S. 146;
N. Y. Cent. R. v. Carr, 238 U. S. 260;
Southern R. v. Puckett, 244 U. S. 571;
Louisville R. v. Parker, 242 U. S. 13.

In *Pederson v. D., L. & C. R.*, 229 U. S. 146, this Court says that the true test is

"Is the work in question a part of the interstate commerce in which the carrier is engaged?"

And then adds:

"Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not, as yet, become instrumentalities in such commerce, *but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their work as such.*" (Italics are ours.)

In *N. Y. Cent. R. vs. Carr*, 238 U. S., 260, the Court said:

"Each case must be decided in the light of the particular facts, with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, *or in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereto.*" (Italics ours.)

From these cases, illustrating the general principle applicable, as well as by the decisions directly on the question, previously cited, it is certain, we submit, that Szary, at the time of his injury, was employed in interstate commerce, in that he had charge of, and was actually working upon *stationary and permanent instrumentalities of such commerce*, namely, the "Big stoves"; "built for that;" "big, round stoves that are made for that work, to dry sand," (52) which it was absolutely

necessary in the conduct of such commerce, to keep in order, for the sole purpose of preparing the sand and getting it in condition to place in the different locomotives or engines into which it was continuously passing. At the very moment of the accident he was working in connection with one of these instrumentalities.

All of the cases cited by the petitioner are distinguishable from the one at bar. Its principal cases are the following, to the distinguishing features of which we will briefly call attention:

In *Minn. R. R. vs. Winters*, 242 U. S., 253, the employee was engaged as a machinist's helper in making repairs on an engine. The contention that he was engaged in interstate commerce was based solely upon the alleged interstate quality of the engine at the time. It appeared, however, that it was not being used in interstate commerce at the time, and that there was no order that it should be so used, and that no such definite purpose was shown. Its next function might be either interstate or intrastate. As the Court there stated, it was

“not like the matter of repairs upon a road permanently devoted to commerce among the States.”

In the case at bar the stoves which Szary was attending and in the act of cleaning at the time of his injury certainly *were* “permanently devoted to commerce among the States.”

C. B. & Q. R. v. Harrington, 241 U. S., 177; *D. L. & W. R. v. Yurkonis*, 238 U. S., 439; and *Lehigh Railroad v. Barlow*, 224 U. S. 183, were

all cases arising out of injuries in the handling of coal. There was no contention in any one of them that the general employment of the plaintiff was interstate, or that the injury was sustained by the plaintiff while engaged in connection with a "permanent instrumentality of interstate commerce."

In the *Yurkonis* case the coal was simply being mined. It was said that:

"the mere fact that the coal might be used, or was intended to be used, in the conduct of interstate commerce, or the fact that the same was mined for transport did not make the injury received by the plaintiff one received while he was engaged in interstate commerce."

Of course the miner had no interstate employment as did Szary in the case at bar. Generally speaking he simply mined the coal. The contention that the employment was interstate would be based entirely upon the interstate quality of the coal at the time, and it had none. Neither had the mines or the miners. There was no certain or immediate use of the coal in interstate commerce in view. It might be so used, and it might not. In the case at bar, however, the use of the "stove" a "permanent instrumentality" for the drying of the sand that was continuously passing into interstate locomotives, was both certain and immediate.

In the *Barlow* case the employee was engaged as a member of a switching crew in assisting in placing on an unloading trestle in the yard coal cars belonging to the company loaded with supply coal

for it *which had remained in the yards upon sidings for several days* before removal to the trestle. It was sought to make the employment interstate because the coal had been brought from without the state. It was held that this interstate function had ended several days before, the Court saying:

“We think their interstate movement terminated before the cars left the siding, and that while removing them the switching crew was not employed in interstate commerce.”

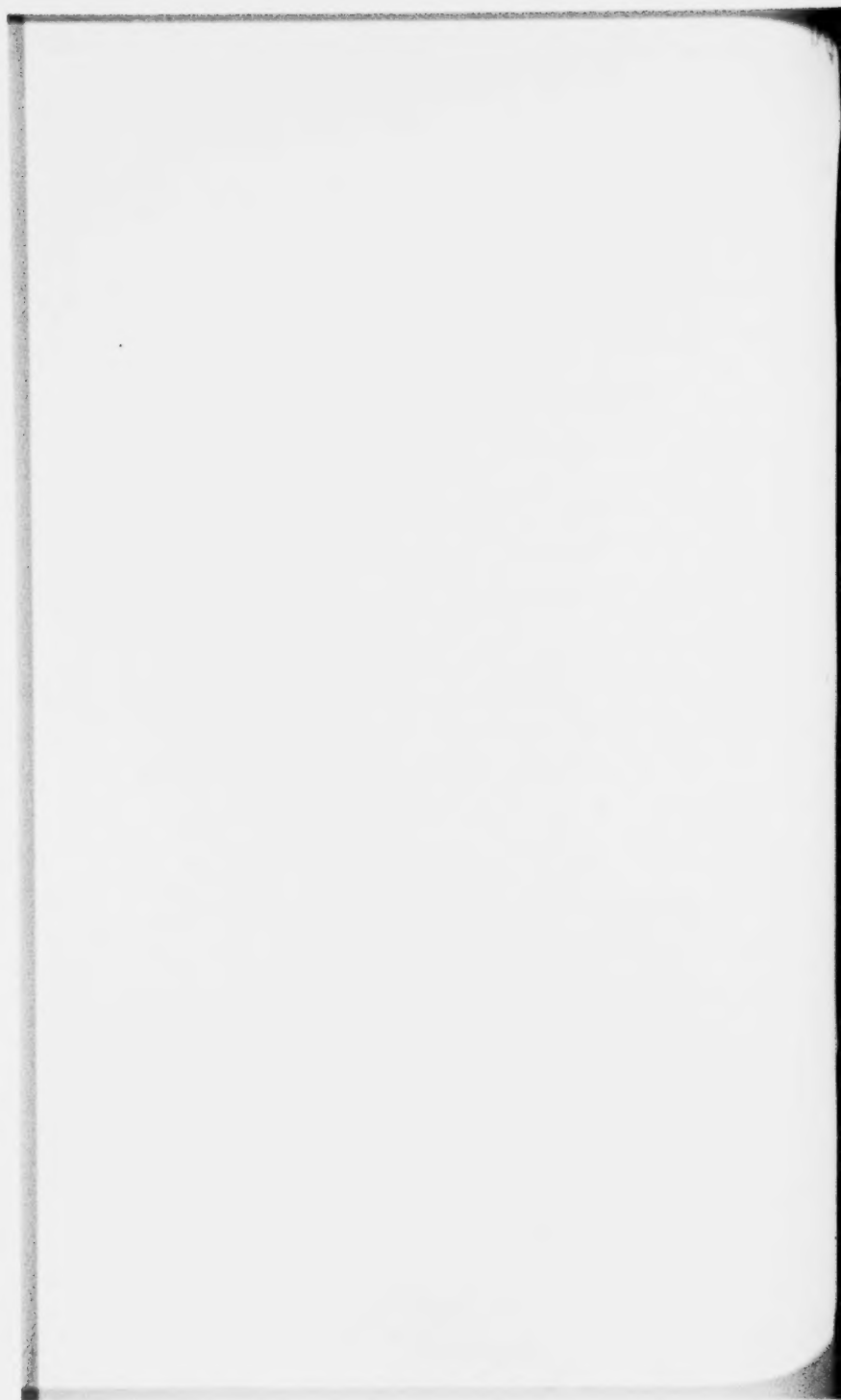
To the same effect is the decision in the *Harrington* case.

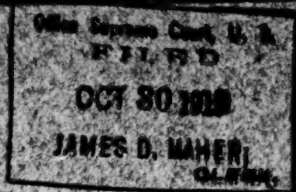
Szary at the time of his injury was actively engaged in his work (90). He was in the act of returning to the sand house with the ash pail in which he had removed the ashes from the stove—the “permanent instrumentality” of interstate commerce.

Conclusion.

The petition and motion for a writ of certiorari should be denied.

JOHN C. ROBINSON,
Counsel for Respondent.





Supreme Court of the United States

OCTOBER TERM, 1919.

—
No. 355.
—

EBIE RAILROAD COMPANY,

Petitioner,

against

ANTONI SZARY,

Respondent.

Motion and Petition to Advance Case.

STETSON, JENNINGS & RUSSELL,
Attorneys for Petitioner.

WILLIAM C. CANNON,
Of Counsel.



Supreme Court of the United States

OCTOBER TERM, 1919.

ERIE RAILROAD COMPANY,
Petitioner,

against

ANTONI SZARY,
Respondent.

No. 355

Motion to Advance Case.

Sir:

Please take notice that upon the annexed petition and upon the Transcript of Record filed herein, the undersigned shall move this Court, at the October Term, 1919, thereof, to be held in the Capitol at the City of Washington, District of Columbia, on the 17th day of November, 1919, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order directing that

Motion to Advance Case.

the argument of the appeal in this case be advanced and that the same be set down for a day certain to be fixed by the Court.

Dated New York, October 25, 1919.

Yours, etc.,

WILLIAM C. CANNON,
Counsel for Petitioner,
Office and Post Office Address,
15 Broad Street,
Borough of Manhattan,
City of New York.

To JOHN C. ROBINSON, Esq.,
Counsel for Respondent,
31 Nassau Street,
New York City.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

ERIE RAILROAD COMPANY,
Petitioner,

against

ANTONI SZARY,
Respondent.

No. 355

Petition on Motion to Advance Case.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Erie Railroad Company, a New York corporation, respectfully shows as follows:

1. This case comes before this Honorable Court pursuant to a writ of certiorari granted herein to review a judgment of the United States Circuit Court of Appeals for the Second Circuit.

2. Antoni Szary brought this action based on the Federal Employers' Liability Act to recover against the Erie Railroad Company for personal injuries received while in the employ of the Erie Railroad Company as a sand drier. The plaintiff was injured while emptying ashes from a stove in which sand was dried. The sand which was dried

Petition on Motion to Advance Case.

in this stove was taken from a storage bin, placed in the stove, dried, removed from the stove and again placed in a storage bin and from this bin distributed indiscriminately to locomotives engaged in interstate and exclusively intrastate commerce. On the trial of this action your petitioner contended that the respondent was not engaged in interstate commerce at the time of the accident.

3. A judgment was recovered against your ~~re~~^{PETITIONER} ~~spondent~~ in the District Court and this judgment was affirmed on appeal by the Circuit Court of Appeals for the Second Circuit.

4. In the case of *Collins vs. Erie Railroad Co.* involving similar facts, a writ of certiorari has been allowed by this Court. Both cases come up from the Circuit Court of Appeals of the Second Circuit. In the *Collins* case, the plaintiff was engaged in repairing a gas engine used to pump water into a storage tank, from which it was taken by engines engaged in interstate and intrastate commerce. The Circuit Court of Appeals held that the plaintiff was engaged in interstate commerce, one judge dissenting. The case at bar was decided after the *Collins* case, the Court following that decision, two of the Judges, however, stating in a concurring opinion that as an original question they would have held that the plaintiff was not engaged in interstate commerce.

5. The writ of certiorari was allowed in these cases because of the marked diversity of opinion

Petition on Motion to Advance Case.

existing in the various Circuit and District Courts of the United States, which is typified by the opinions of the four judges who heard and decided the *Collins* case and the present case. In view of the fact that similar cases are constantly arising, not only in the Federal Courts, but also in the State Courts, it is respectfully submitted that an early decision should be made in the case at bar and the law settled as soon as possible, in the interest of railroad employer and employees, and for the guidance of the lower courts.

6. The attorney for the respondent joins in the motion to advance this case.

Wherefore your petitioner respectfully prays that this Honorable Court will grant its motion to advance this case on the calendar of this Honorable Court.

Respectfully submitted,

WILLIAM C. CANNON,
Counsel for Petitioner Erie Rail-
road Company.

Office Supreme Court, U. S.
FILED

DEC 15 1919

JAMES D. WAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 355.

ERIE RAILROAD COMPANY,

Petitioner,

against

ANTONI SZARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF ERIE RAILROAD COMPANY, PETITIONER

STETSON, JENNINGS & RUSSELL,

Attorneys for Petitioner,

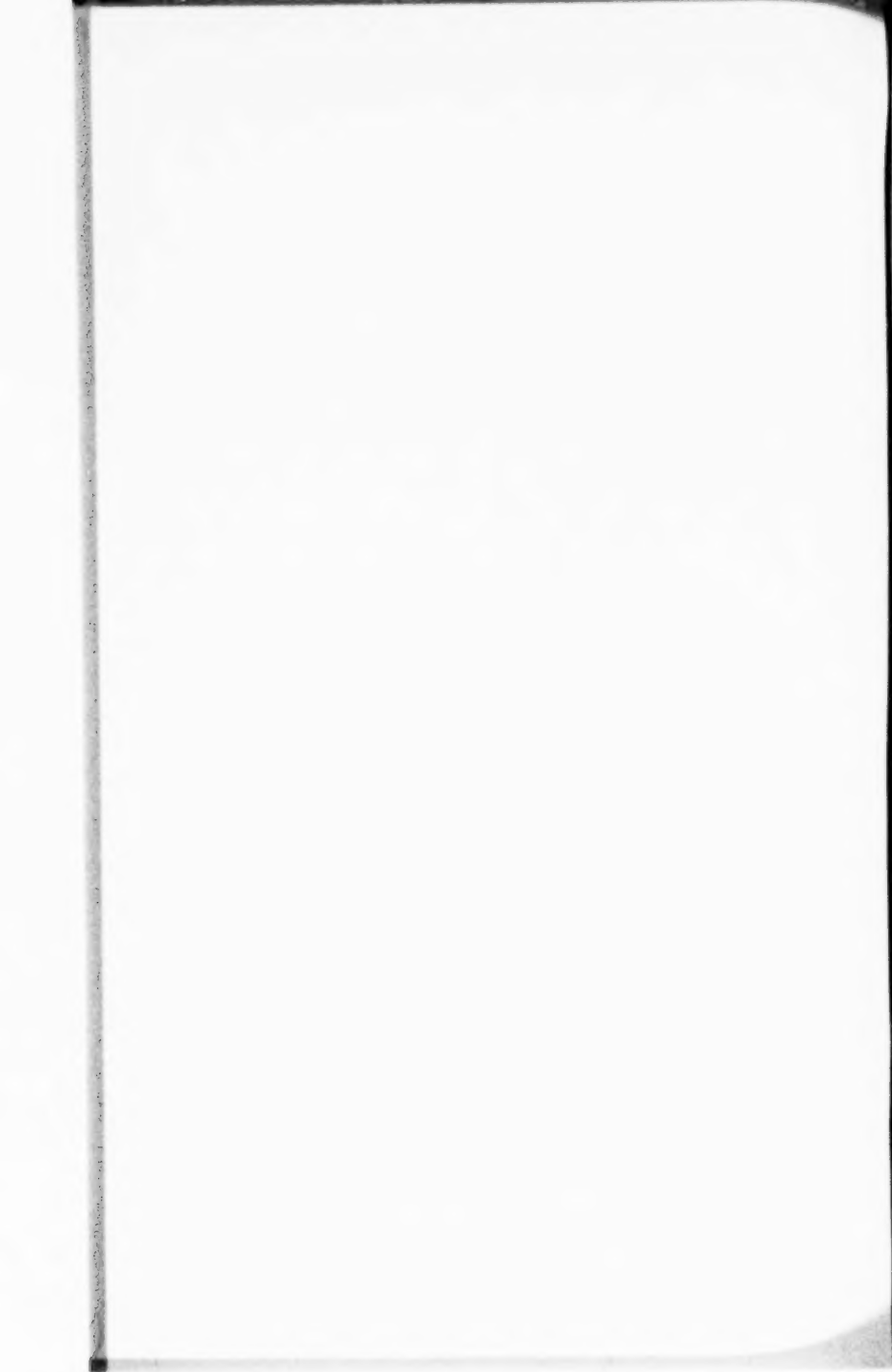
15 Broad Street,

New York City, New York.

WILLIAM C. CANNON,

COULTER D. YOUNG,

Of Counsel.



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Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 355.

ERIE RAILROAD COMPANY,
Petitioner,

AGAINST

ANTONI SZARY,
Respondent.

BRIEF ON BEHALF OF ERIE RAILROAD COMPANY, PETITIONER.

Statement.

This is a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York, for \$20,053.53 in favor of Antoni Szary after a trial before Hon. MARTIN T. MANTON, United States District Judge, now Circuit Judge. Upon appeal to the Circuit Court of Appeals, the judgment was affirmed, Circuit Judge ROGERS writing the opinion (Transcript of Record, pp. 165-169), two of the judges, Circuit Judge HOUGH and Dis-

strict Judge LEARNED HAND writing concurring opinions in which they stated that they concurred because they felt bound by the earlier decision of that Court in the case of *Erie Railroad Co. vs. Collins* (259 Fed. Rep., 172), which was decided by a Court differently constituted than the Court which passed upon this case. The *Collins* case is now before this Court upon writ of certiorari. Judges HOUGH and HAND, the first of whom sat in the *Collins* case and there dissented, stated that they were of the opinion, as a matter of first impression, that the decision of this Court in the case of *C. B. & Q. R. R. Co. vs. Harrington*, 241 U. S., 177, should have governed both cases. In the *Collins* case Judge MANTON, who was the Trial Judge in the present case, sat as a Circuit Judge and was one of the majority of the Court. This case and the *Collins* case, therefore, have been passed upon by four Judges of the Second Circuit, with an equal division of opinion.

This action was brought to recover the sum of \$40,000 damages for personal injuries sustained by Antoni Szary, hereinafter referred to as the plaintiff, while in the employ of the Erie Railroad Company, hereinafter referred to as the defendant.

The plaintiff was employed as a sand drier and was injured in the yard of defendant at Jersey City, New Jersey, on the 5th day of January, 1917 (Transcript of Record, p. 19). The accident is alleged to have occurred by reason of the defendant permitting a "light" switching engine to move down the track next to the sand house without lights and without giving warning signals, as a result of which the plaintiff was run down and lost his left leg (Complaint, Transcript of Record, p. 3).

The plaintiff recovered a verdict for \$20,000. He was earning \$18 a week (Transcript of Record, p. 27). He could not speak the English language and his testimony was given through an interpreter.

The plaintiff had been employed in the Jersey City Yards of the defendant for three years (Transcript of Record, p. 19) and had worked at the sand house for about a year and a half (Transcript of Record, p. 19) during part of which time he worked on the day shift.

The plaintiff testified that his work consisted of taking rough sand, which he obtained from a storage bin where it had been stored, putting it into the stove to dry it and then screening it (Transcript of Record, p. 20). After the sand was screened it was placed in the shed where it was again stored (Transcript of Record, p. 15) until put into engines. Some of these engines were engaged in interstate commerce and some in intrastate commerce (Transcript of Record, p. 16). This sand was brought into the yard every Sunday and dumped into the storage bin (Transcript of Record, pp. 53, 54). The accident happened on a Friday. The sand had, therefore, been in storage for several days before the accident. The plaintiff testified that part of his job consisted of keeping the fires in the sand stove burning and cleaning out the ashes when the fire was burned out. These ashes he was accustomed to carry to what was known as the ash pit where he dumped them (Transcript of Record, p. 20).

On the night of the accident plaintiff came on duty at six o'clock in the evening. After coming on duty he put sand into seven engines, the last engine having been sanded at nine o'clock (Transcript of Record, p. 21). After sanding this engine the plaintiff removed the ashes from the stove, cleaned the stove and carried the ashes to the ash pit about thirty feet from the sand house (Transcript of Record, p. 21). To go to the ash pit it was necessary for him to cross one track. When he reached the ash pit he dumped the ashes in the pit and left the pail at the ash pit while he went to the engine room, which was on the same side of

the track as the sand house, for a drink of water (Transcript of Record, p. 22). After getting his drink of water the plaintiff came out of the engine room to go over to the ash pits for the pail he had left there. He testified that he looked around, but could not see any approaching engine, nor could he hear any engine approaching "because further on there were a lot of engines moving and there was a lot of noise." He then stepped onto the track and had moved about two feet when an engine struck him and ran over him (Transcript of Record, p. 23), causing the injuries complained of. The accident occurred at about nine-thirty o'clock (Transcript of Record, p. 21). There were no eye witnesses to the accident. *There was no proof as to what engine the plaintiff would have next supplied with sand if the accident had not occurred.*

The plaintiff alleged that the accident was caused by the failure of those operating the engine to give signals or warning or to have the headlight lit. The only testimony as to this was the testimony of the plaintiff and his cousin Justin Kishkel. Kishkel testified that he did not see the engine that ran over the plaintiff and that the first he knew of the accident was when he heard the plaintiff scream (Transcript of Record, p. 40). On cross-examination he testified he was not listening for any signals on the night in question (Transcript of Record, p. 44). The defendant offered the testimony of Messrs. Brown, McCarthy, Hammell, Webb and Tierson. All of these witnesses, three of whom had left the employ of the defendant, testified that the headlight was lighted at the time of the accident and four of them testified that the whistle had been blown as the engine started and that the bell was ringing automatically from the time the engine started to the time the accident occurred (Transcript of Record, pp. 57, 64, 65, 70, 89, 90, 105, 107, 118, 124 and 132).

Specification of Errors Presented in the Circuit Court of Appeals and Here Urged.

1. The District Court erred in denying the motion to dismiss the complaint, made at the close of the plaintiff's case (Transcript of Record, p. 159).

2. The said Court erred in denying defendant's renewal of the motion to dismiss the complaint made at the end of the plaintiff's case which renewal was made at the end of the whole case (Transcript of Record, p. 160).

3. The said Court erred in overruling and denying the motion to dismiss the complaint made by the counsel for the defendant made at the end of the whole case (Transcript of Record, p. 160).

4. The said Court erred in giving the following charge to the jury in its main charge, to which defendant's counsel duly excepted as follows:

“The railroad company, as I have said, was engaged in interstate commerce, that is, it ran its trains between states, engaged in hauling commerce and engaged in hauling passengers. I charge you that if you find from the proof in the case that it was engaged in hauling passengers and freight between states, and that as a part of carrying on that commerce, as an instrumentality and a necessity for carrying on that commerce, it used sand in its business and used it in the locomotives for the purpose of running and operating the locomotives safely, and if the duty of this plaintiff on this occasion required him to help in the preparation of that sand and as one of his duties at the time of the happening of this accident he was engaged in going to get a receptacle or a can used for taking ashes from a furnace or a stove which was used for heating that sand, and therefore for preparing the sand, if he was engaged in that work at the time he met with

that accident and you are satisfied by the fair preponderance of the proof that the sand was used indiscriminately for interstate locomotives and intrastate locomotives, then I charge you that the plaintiff at the time of the happening of his accident was engaged in interstate commerce.

Mr. von Bernuth: I except to that portion of your Honor's main charge where you say—I think you said it more than once—that if the jury find that sand was used indiscriminately for interstate and intrastate commerce the jury should find that the defendant was engaged in the interstate commerce and the plaintiff comes within the Federal Employers' Act" (Transcript of Record, page 161).

5. The said Court erred in giving the following charge and in submitting to the jury the question of whether plaintiff was engaged in interstate commerce, to which defendant's counsel duly excepted as follows:

"The railroad company, as I have said, was engaged in interstate commerce, that is, it ran its trains between states engaged in hauling commerce and engaged in hauling passengers. I charge you that if you find from the proof in the case, that it was engaged in hauling passengers and freight between states, and that as part of carrying on that commerce, as an instrumentality and a necessity for carrying on that commerce, it used sand in its business and used it in the locomotives for the purpose of running and operating the locomotives safely, and if the duty of this plaintiff on this occasion required him to help in the preparation of that sand, and as one of his duties at the time of the happening of this accident he was engaged in going to get a receptacle or a can used for taking ashes from a furnace or a stove which was used for heating that sand, and therefore for preparing the sand, if he was engaged in that work at the time he met with that accident and you are satisfied by the fair preponderance of the proof that the sand was used

indiscriminately for interstate locomotives and intrastate locomotives, then I charge you that the plaintiff at the time of the happening of this accident was engaged in interstate commerce.

Mr. von Bernuth: I also except to your Honor's permitting the jury to pass upon the question as to whether the plaintiff was engaged or was not engaged in interstate commerce under the Federal Employers' Liability Act' " (Transcript of Record, pages 161-162).

6. The said Court erred in giving the following charge, to which defendants' counsel duly excepted as follows:

"The Court: Any requests, Mr. Robinson?

Mr. Robinson: I have only this, your Honor. I except to your Honor's leaving it to the jury to find, as a question of fact, whether or not the plaintiff was engaged in interstate commerce at the time of this accident. I would just like to save that exception. You do leave it to them to decide as a question of fact.

The Court: No; I said that if the jury found that he was doing the work he claimed he was doing in his testimony at the time that he was engaged in interstate commerce, and the further circumstance that the sand was used indiscriminately for interstate and intrastate commerce.

Mr. von Bernuth: I except to your Honor's charge in that respect' " (Transcript of Record, page 162).

7. The said Court erred in refusing to give the following charge, to which defendant's counsel duly excepted as follows:

"Mr. von Bernuth: I ask your Honor to charge the jury that if the plaintiff was in the yard and on the tracks of the defendant at the time of the accident for the purpose of disposing, or in connection with the purpose of disposing of burned out ashes from the sand drying stoves, that he was not en-

gaged in interstate commerce and their verdict must be for the defendant.

The Court: I do not just understand that request. I notice that here. Do you mean that if he was carrying ashes from the stove—wait a moment, do you mean that if he was carrying ashes from the stove which was used for heating the sand?

Mr. von Bernuth: Yes.

The Court: No; I refuse to charge that.

Mr. von Bernuth: I except to your Honor's refusal to charge as requested.

The Court: You do not mean by that in crossing the track. You mean just coming out and dumping the ashes?

Mr. von Bernuth: No. I do not request that. He was in the yard for the purpose, or had come into the yard for the purpose of dumping ashes from this sand drying stove into the pit. He was not engaged in interstate commerce.

The Court: I will charge that if he was doing that he cannot recover, because plaintiff's theory of recovery is different. He says he was crossing the track; he does not say he was doing that at all.

Mr. von Bernuth: I do not think you quite understand me. I merely mean the general purpose for which the plaintiff went into the yard of the defendant at that time, that that does not constitute interstate commerce.

The Court: I will refuse to charge except as I have already charged on that point.

Mr. von Bernuth: I except to your Honor's refusal to charge' " (Transcript of Record, pages 162-163).

8. The District Court and the Circuit Court of Appeals erred in holding that plaintiff was engaged in interstate commerce at the time of his injury, and in awarding and entering judgment in favor of the plaintiff and against the defendant and in not awarding judgment in favor of the defendant.

ARGUMENT.

POINT I.

The plaintiff was not engaged in interstate commerce at the time of his injury and the Federal Employers' Liability Act is not applicable.

POINT II.

The opinions of the Circuit Court of Appeals in this case and in the Collins case are opposed to the reasoning and principles enunciated by this Court.

POINT III.

The judgment and mandate of the Circuit Court of Appeals should be reversed.

POINT I.

The plaintiff was not engaged in interstate commerce at the time of his injury and the Federal Employers' Liability Act is not applicable.

The action was brought under the Act of Congress known as the Federal Employer's Liability Act. The pleadings raised the issue as to the plaintiff's employment in interstate commerce at the time he sustained his injury, and the burden was upon the plaintiff to establish that he was engaged in such commerce in order to come within the purview of the Federal statute.

Pedersen vs. D., L. & W., 229 U. S., 146.

Southern Ry. vs. Lloyd, 239 U. S., 496-501.

McAuliffe vs. N. Y. Central R. R. Co., 164 App. Div. (N. Y.), 846.

This Court has consistently held that the test as to whether or not the employee was engaged in interstate commerce depends upon the work in which he was engaged at the time of the injury.

Illinois Central R. R. Co. vs. Behrens, 233 U. S., 473.

Erie R. R. Co. vs. Welsh, 242 U. S., 303.

Shanks vs. D., L. & W. R. R. Co., 239 U. S., 556.

C., B. & Q. vs. Harrington, 241 U. S., 177.

Southern Ry. Co. vs. Puckett, 244 U. S., 571.

The cases hold that a man may be employed in a position of a dual nature, that is, in interstate and intrastate commerce, and when so employed the courts will differ-

entiate and determine what was the nature of the work he was engaged in at the particular moment the accident happened.

N. Y. Central R. R. Co. vs. Carr, 238 U. S., 260.

The plaintiff in the case at bar was employed by the defendant as a sand-drier. At the moment of his injury, he was on his way from a place where he had obtained a drink of water to get a pail with which he had previously removed some ashes from the stove in which sand was dried in preparation for use in engines. The sand was put into storage every *Sunday* (Transcript of Record, p. 54). The plaintiff was injured on *Friday*, five days after the sand had been placed in storage. The plaintiff's duties required him to remove the sand from this *storage* (Transcript of Record, pp. 11, 20 and 28) and place it in the stove, where it was heated and dried (Transcript of Record, pp. 11 and 21). He would then remove it from the stove, screen and sift it (Transcript of Record, pp. 11 and 21) and put it into *storage again* from which *storage* he and his fellow-workmen supplied engines engaged in interstate and exclusively intrastate commerce as occasion arose. His duties as sand-drier, apart from actually delivering sand to an engine, may be divided into two parts: (1) preparing the sand for storage, and (2) caring for the stove and fire with which the sand was prepared for storage.

(1) It seems clear from the decisions of this Court that the preparation of the sand for, or placing it in, storage would not constitute interstate commerce. In *C., B & Q. R. Co. vs. Harrington*, 241 U. S., 177, deceased was a member of a switching crew. At the time of the injury he was engaged in switching coal cars from a storage track to a coal chute, where the coal was to be placed in bins and

supplied as needed to locomotives of all classes, some of which were engaged in interstate commerce and others in intrastate commerce. This Court said, page 179:

"With the movement of the coal to the storage tracks, however, we are not concerned; that movement had long since ended, as it is admitted that the coal was owned by the company and 'had been in storage in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident.' So, also, as the question is with respect to the employment of the decedent at the time of the injury; (*Illinois Cenral R. R. vs Behrens*, 233 U. S., 473, 478), it is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. *That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed, or chutes, and the only ground for invoking the Federal Act is that the coal thus placed was to be used by locomotives in interstate hauls.* As we have pointed out, the Federal Act speaks of interstate commerce in a practical sense suited to the occasion and 'the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.' *Shanks vs. Del., Lack. & West. R. R.*, 239 U. S., 556, 558, and cases there cited. *Manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use.* It has been held that an employee of the carrier, while he is mining coal in the carriers' colliery intended to be used by

its interstate locomotives, is not engaged in interstate commerce within the meaning of the Federal Act (*Del., Lack. & West. R. R. vs. Yurkonis*, 238 U. S., 439), and there is no distinction in principle between the two cases."

If the plaintiff had been placing the dried sand in storage he would have been engaged in the same kind of work as Harrington was, and this Court has held that such work was not interstate commerce. But the plaintiff here was even more remote from an act of interstate commerce than was Harrington, for the plaintiff, at the time of his injury, was, at best, engaged in work which was antecedent to putting engine materials into storage, viz., the work of caring for the fire which prepared the sand for storage.

In the case of *Lehigh Valley R. R. vs. Barlow*, 244 U. S., 183, the plaintiff was engaged in moving cars containing supply coal to an unloading trestle, and this Court held he was not engaged in interstate commerce. This Court said:

"The accident occurred July 27, 1912, when, as member of a switching crew, *he was assisting in placing three cars containing supply coal for plaintiff in error on an unloading trestle within its yards at Cortland, New York.* These cars belonged to it and with their contents had passed over its line from Sayre, Pennsylvania. After being received in the Cortland yards—one July 3rd and two July 10th—they remained there upon sidings and switches until removed to the trestle on the twenty-seventh.

We think their interstate movement terminated before the cars left the sidings, and *that while removing them the switching crew was not employed in interstate commerce.* The essential facts in *Chicago, Burlington & Quincy R. R. Co. vs. Harrington* 241 U. S., 177, did not materially differ from those now presented. There we sustained a recovery by an employee, holding he was not engaged in inter-

state commerce; and that decision is in conflict with the conclusion of the Court of Appeals. The judgment under review must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

In the case of *Hudson & Manhattan Railroad Co. vs. Iorio*, 239 Fed., 855, decided by the Circuit Court of Appeals for the Second Circuit in 1917, the plaintiff who was injured while storing rails for further use in interstate commerce was held not engaged in interstate commerce. In this case the Court said, at page 856:

"It cannot be said that the rails which Iorio was engaged in storing against a use that was certainly not imminent, and might never occur, were at the moment engaged in or practically part of, interstate commerce; for that commerce was going on *without any present assistance*, either from Iorio, or the rails on which he was working, or the men who were working with him. We, therefore, hold that the actual employment or use at the moment of injury of the thing upon which the person injured was working is the test of applicability of the statute, under circumstances such as shown here."

The plaintiff in the case at bar was employed in the preparation of sand prior to its storage. He was not as closely connected with interstate commerce as Iorio was, who was actually storing the material, and as the Court suggested in that case, the sand might never have been used for any purpose and the interstate commerce of the defendant which was going on was *without present assistance* either from the plaintiff or the sand which was being heated in the stove from which he had removed the ashes. Its ultimate use depended upon subsequent possibilities and the existence of such possibility is not sufficient to characterize the present act of the plaintiff as one of interstate

commerce. As was said in the case of *M. & St. L. R. R. Co. vs. Winters*, 242 U. S., 353:

"Its character as an instrument of commerce depended upon its employment at the time not upon remote possibilities or upon accidental later events."

(2) The other phase of the plaintiff's employment, namely, the cleaning of the stove that dried the sand and the removal of the ashes from the stove, is the most favorable view of the evidence for the plaintiff. On the night of the accident the plaintiff had cleaned the stove, removed the ashes (fol. 96), taken them over and dumped them into the ashpit. After dumping the ashes in the ashpit he set the pail down and re-crossed the track to the engine house, where he got a drink of water. When on the way back to the ashpit to get the pail he was run over and injured. So that at the *time* of his injury he was not even engaged in removing the ashes from the stove. But assuming that his act was a part of his cleaning the stove, it did not have to do with any interstate operation.

In the case of *Shanks vs. Del., L. & W. R. R.*, 239 U. S., 556, the plaintiff was employed in a shop where the defendant made repairs to engines engaged in both interstate and intrastate commerce. Usually he was engaged in repairing engines, but at the time of his injury he was engaged solely in taking down and putting into a new location an overhead countershaft, a heavy shop fixture through which power was communicated to some of the machinery used in the repair work. The Court held that the test was whether or not the plaintiff was engaged in interstate work *at the time* of his injury, and held that he was not engaged in interstate commerce. The Court said (p. 559):

"Coming to apply the test to the case in hand it is plain that Shanks was not employed in inter-

state transportation or in repairing, or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. *The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines, some of which were used in such transportation.* This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the Yurkonis case, was too remote from interstate transportation to be practically a part of it, and therefore he was not employed in interstate commerce within the meaning of the Employers' Liability Act."

Applying this rule to the case at bar, it would seem that the nearest the plaintiff came to being engaged in interstate commerce at the time of his injury was in removing ashes from a *fixture*. To paraphrase the language in the *Shanks* opinion to apply to the facts in the present case, the connection between the *fixture* and the interstate transportation *was remote at best*, for the only function of the fixture was to convey heat to sand which was placed in storage and then used in supplying engines, some of which were used in interstate transportation.

Applying the most favorable construction of the case to the plaintiff, he was engaged in taking care of a *fixture*. But surely such a fixture as this stove cannot under the decision of the *Shanks* case (*supra*) be said to be *even remotely* connected with interstate commerce. All this stove was used for was heating and drying of sand as it was moved from *storage to storage* and such a use cannot be said to make it an instrument of interstate commerce, as

the sand which was prepared might never have been used in such commerce.

In the case of *D., L. & W. R. R. Co. vs. Yurkonis*, 238 U. S., 439, the plaintiff at the time he was injured was employed by the defendant as a miner in its colliery where the defendant mined and prepared anthracite coal for use in its locomotives and engines and other equipment used in its business as a common carrier in interstate commerce. The Court said (page 444) :

"The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce, facts essential to recovery under the Employers' Liability Act."

There is no conceivable way in which the plaintiff can be held to have been employed in interstate commerce unless we are to disregard the decisions in the *Harrington*, *Yurkonis* and *Shanks* cases.

The recent decisions of this Court have clarified the rule to be applied to these cases, as shown by the following cases, to which we will briefly refer. In the case of *Illinois Central R. Co. vs. Cousins*, 241 U. S., 641, the plaintiff was wheeling coal to one of the car repair shops. The coal was intended for use in heating stoves in a shop where employees of the defendant were engaged in repairing cars. The defendant was engaged in interstate commerce as well as intrastate commerce and many, if not all, of the cars repaired in the shop were cars that moved only in interstate commerce. The Supreme Court of Minne-

ota held that the plaintiff was engaged in interstate commerce, and said:

"That the men engaged in repairing the cars were employed in interstate commerce is well settled. That an employee carrying materials to the shop to be used in repairing the cars would be employed in interstate commerce the Pedersen Case decides. It seems no extension of the construction thus given to the statute to hold that an employee carrying coal for use in heating the shop where the repairs were made is employed in interstate commerce. The repairs could not be made unless the shop was heated. It is not material what our own views are on the proper construction of the federal statute. We are bound by the decisions of the Supreme Court of the United States. We think the Pedersen Case controls the case at bar" (148 N. W. Rep., 58).

This Court, however overruled this decision with a memorandum opinion citing as authority the *Yurkonis* and *Shanks* cases.

The decision of this Court in overruling the Supreme Court of Minnesota is a determination that the plaintiff here was not engaged in interstate commerce or that his work was so remotely connected with such commerce as not to be a part thereof.

In *Baltimore & Ohio R. Co. vs. Branson*, 242 U. S., 623, this Court overruled the Court of Appeals of Maryland when that Court had held that the plaintiff was engaged in interstate commerce. The plaintiff in that case had been engaged for about eleven months in painting cars and engines of the defendant with a "paint gun" and the fine mist or spray which resulted from the operation of this instrument had resulted in an injury to his health. The cars and engines that he had been engaged in painting were cars and engines used in interstate com-

merce. The State Court said that "Without paint the engines would corrode and the woodwork of the cars decay" and assuming that it was following the *Pedersen* case held that the work of painting the cars seemed to be a reasonable and substantial relation to interstate commerce and hence the plaintiff was engaged in interstate commerce.

This Court, however, overruled this decision of the State Court in a memorandum opinion on the authority of *D., L. & W. R. R. Co. vs. Yurkonis*, 238 U. S., 439; *Shanks vs. D. L. & W. R. R.*, 239 U. S., 556; *C. B. & Q. R. R. Co. vs. Harrington*, 241 U. S., 177,, 180 and *Minn. & St. L. R. R. vs. Winters*, 242 U. S., 353.

In the *Branson* case the plaintiff was engaged in keeping up interstate equipment, an employment which seems rather closely connected with interstate commerce. In the case at bar the plaintiff was engaged or *had* been engaged in emptying ashes from a stove that heated sand that came from storage and was placed in storage after being dried from where it *might* be used in supplying engines engaged in either intrastate commerce or interstate commerce; work not so closely related to interstate commerce as the work of the plaintiff in the *Branson* case.

Although there has been a diversity of opinion in the decisions of the various State and Federal Courts, there are decisions which recognize and apply the rule contended for by the petitioner.

On facts parallel to the case at bar the Circuit Court of Appeals for the Fourth Circuit has held that the Federal Act was inapplicable. *Southern Ry. vs. Pitchford*, 253 Fed., 736. The plaintiff was employed in the yard and one of his duties was to take ice from wagons and place it in an ice box from which he supplied it to both interstate and intrastate cars as needed. The Court said:

"But for the accident, the plaintiff with other employees, would have placed the push car on the track,

received the ice from the wagons through the chute, pushed the car to the ice box, and removed the ice from the car to the box. After this the plaintiff in the usual course of his employment would have iced from the box cars to be attached to both interstate and intrastate trains. The cars that he would in due course have first iced would have been the cars to be used in interstate transportation. Application to these facts of the decisions of the Supreme Court leaves no escape from the conclusion that the plaintiff was not engaged in interstate commerce at the time of the injury, and therefore could not recover under the federal statute.

The familiar test is: Was the employee at the time of injury employed in interstate transportation, or in a work so closely related to it as to be practically a part of it? *Shanks vs. Delaware, L. & W. R.*, 239 U. S., 556, 36 Sup. Ct., 188, 60 L. Ed., 436, L. R. A., 1916C, 797.

It is immaterial that the plaintiff's last previous work may have been cleaning an interstate car, or that his next work would certainly have been icing an interstate car from the ice box. *Illinois Cent. R. vs. Behrens*, 233 U. S., 473, 34 Sup. Ct., 646, 58 L. Ed., 1051, Ann. Cas., 1914C, 163; *Erie R. Co. vs. Welsh*, 242 U. S., 303, 37 Sup. Ct., 116, 61 L. Ed., 319; *Delaware, L. & W. R. vs. Yurkonis*, 238 U. S., 439, 35 Sup. Ct., 902, 59 L. Ed., 1397. He had entered upon the work of receiving ice from the chute and transporting it to an ice box. This work was too remote from interstate commerce to be regarded a part of it. *Chicago, B. & Q. R. R. vs. Harrington*, 241 U. S., 177, 36 Sup. Ct., 517, 60 L. Ed., 941."

The case of *Giorio vs. N. Y. Central R. R. Co.*, 176 App. Div. (N. Y.), 230, resembles the case at bar in several respects. In the *Giorio* case, the plaintiff worked at the coal pockets of the defendant. Part of the time his work consisted of coaling the engines as required and part of the time in loading coal from the cars into the coal pockets.

Just prior to the accident the plaintiff loaded coal into a switch engine which was used solely within the yards in hauling cars of both intrastate and interstate character about the yards. On the day of the accident it had been used in hauling cars of interstate character only and was so used on the following day. Prior to the accident the engine had finished its work for the day, dumped its fire in the ashpit, taken on water and proceeded to take on coal. After taking on coal the engine backed down to the round-house and the plaintiff was killed by being crushed between the tender and the roundhouse door. After reviewing the *Harrington*, *Behrens* and *Winters* cases, the Court held that the plaintiff was not engaged in interstate commerce at the time of the happening of the accident. This decision was affirmed by the Court of Appeals, 223 N. Y., 653.

In *O'Dell vs. Southern Ry. Co.*, 248 Fed. Rep., 345, the plaintiff was engaged in repairing an electric motor which when in use operated a bucket for lifting ashes from a pit into which they had been dumped by engines. The engines came in from interstate transportation, were turned over to a hostler and later placed over the ashpit to be cleaned. The electric motor then operated a hoist which removed the ashes from the pit. There was no evidence to show that this particular motor had ever been used in lifting ashes from the pit that were used in ballasting a roadbed. The Court held that there was nothing about an electric motor that made it peculiarly an instrument of interstate commerce and that plaintiff was not engaged in interstate commerce at the time of his injury.

This decision was affirmed by the United States Circuit Court of Appeals for the Fourth Circuit; *Southern*

Ry. Co. vs. O'Dell, 252 Fed. Rep., 540. There the Court said (p. 543):

"Without going into the intricacies of the distinctions, it is enough to say that in our opinion the case is controlled by *D. L. & W., etc., R. R. Co. vs. Yurkonis*, 238 U. S., 439, * * * ; *Chicago, etc., Ry. Co. vs. Harrington*, 241 U. S., 177 * * * ; *Raymond vs. Chicago, etc., Ry. Co.*, 243 U. S., 43, * * *."

In the case at bar the plaintiff had been engaged in removing ashes from a stove where sand was dried during its trip from *storage* to *storage*. The sand was taken from *storage* where it had been for *five days* and heated and then put into storage where it *might* be placed in engines engaged in either interstate or intrastate commerce. There was no testimony offered to show that the sand, subsequent to the accident, had been loaded from storage into an engine engaged in interstate commerce, and the *remote* possibility that it *might* be so loaded would not, under the decision in the case of *Minn. & St. L. R. R. Co. vs. Winters*, 242 U. S., 353, bring the plaintiff under the Employers' Liability Act.

On the trial of this action the Trial Court followed the case of *Roush vs. B. & O. R. Co.*, 243 Fed., 712 (District Court of Ohio). The *Roush* case came before the Court on a petition to remand the case to the State Court from which it had been removed to the Federal Court. The petition set forth that a pump house was used in furnishing water to locomotives engaged in both interstate and intrastate commerce. The plaintiff was injured by an explosion of gas while he was examining the cistern from which the water was pumped. The District Court in remanding the case decided that the pumping station was an instrumentality

used indiscriminately for interstate and intrastate commerce and that the plaintiff was, therefore, engaged in interstate commerce. The Court, however, did not seem confident of its decision, saying:

"The several State Courts of last resort and the federal courts inferior to the United States Supreme Court have differed widely in similar cases and authority may be found supporting either side of the case."

A careful analysis of the decisions of this Court leads to the conclusion that the plaintiff in the case at bar was either *not* connected at all with interstate commerce, or at the best his connection with such commerce was *so remote* as not to be part thereof.

POINT II.

The opinions of the Circuit Court of Appeals in this case and in the Collins case are opposed to the reasoning and the principles enunciated by this Court.

We have set forth the decisions of this Court which we believe should have controlled the lower Court in Point I. It is our intention at this time to merely call attention to certain parts of the decision of the Circuit Court of Appeals, in the case at bar, which we contend are not based either on the law as laid down by this Court or on sound premises.

The Circuit Court of Appeals in considering the question as to the nature of the plaintiff's employment at the time of his injury reasoned from the following attempted

analogy to the facts of *Pedersen vs. D., L. & W. R. Co.*, 229 U. S., 146:

"The question presented is whether the plaintiff at the time of his injury was engaged in interstate commerce.

It will be conceded we suppose that workmen engaged in bolting timbers into a bridge which is a part of the line of an interstate railroad are engaged in the work of interstate commerce. And if timbers have been delivered at the bridge which the men are actually engaged in shortening, narrowing and thinning to make them fit the places into which they are to be bolted such preparatory acts so far partake of the character of the final act of bolting that if an accident happens to the men while so employed it should be held that they were at the time engaged in interstate commerce. And if after the work of shortening, narrowing and thinning is done the men collect the rubbish they have made and remove it to a dump that act is so connected and related to the other that if they are injured while so engaged they would be entitled, as it seems to the writer, to recover under the Federal Employers' Liability Act. The writer is also unable to distinguish such a case from the case now under consideration. The act of sanding the locomotives is an act done in interstate commerce. The act of drying the sand in the stoves performed by the same man who sands the engines and in preparation for that act is as much related to it and as much partakes of its character as does the act of preparing the timbers to be placed in the bridge. And the act of removing the ashes is not distinguishable from the act of removing the rubbish in the case above mentioned."

With this opinion of the Circuit Court we are unable to agree. The Court has here assumed a state of facts which are not at all similar to those in the case at bar in

that in the facts assumed the timbers were to be bolted into a bridge which was permanently devoted to interstate commerce and any of the employees who engaged in the preparation of the timbers that were to go into this bridge could clearly be held to be engaged in interstate commerce under the decision of this Court in the *Pedersen* case. But such is not the case here. The stove that the plaintiff in the case at bar had just finished cleaning out was not permanently devoted to either kind of commerce, but was used solely for the heating of sand which after having been heated was placed in a storage bin for use in engines which might be engaged in either interstate or intrastate commerce. The fact that some of the sand which was heated by the stove went into engines engaged in interstate commerce, surely cannot be said to make this stove an instrumentality of interstate commerce any more than the overhead countershaft in the *Shanks* case which communicated power to some of the machinery used in repairing parts of engines, some of which were used in interstate commerce.

It is submitted that this analogy upon which the decision rests is false. The *Pedersen* case involved "repairs upon a road permanently devoted to commerce among the states." Therefore it may be conceded that the related acts partake of an interstate character, as the Court says.

This Court has recently in the case of *Phil., Baltimore & W. R. R. Co. vs. Smith*, 250 U. S., 101, clearly limited the applicability of the *Pedersen* case, saying (p. 103) :

"Taking it to be settled by the decision of this Court in *Pedersen vs. D., L. & W. R. Co.*, 229 U. S., 146, 152, that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and legal contemplation a part of it * * *."

But "the act of sanding locomotives" is not, as the Court says it is, "an act done in interstate commerce." If the plaintiff had been injured while pouring sand, after drying, from the storage bin into a locomotive engaged in exclusively intra-state commerce, it could hardly be contended that he was at the time engaged in interstate commerce. Any of the sand which he dried might have been so used. As the use of the sand is thus undetermined until the final act appropriating it to one form of commerce or the other, it cannot be said, as in the bridge case, that all related and preliminary acts partake of an interstate character.

Further, in its opinion, the Circuit Court of Appeals said:

"It is said that this case and the Collins case are not distinguishable in principle from the Harrington case. In the Collins case this Court expressed its understanding of that case and it is not necessary to repeat now what was there said."

In the *Collins case* (259 Fed. Rep., 172) the Circuit Court of Appeals in considering the *Harrington case* after reciting the facts in the case said:

"At the time of his death Harrington was engaged in switching coal belonging to the railroad company, and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes from which it was to be supplied as needed to locomotives of all classes whether used in interstate or intrastate traffic. The court held that Harrington while engaged in the moving of the coal from the storage tracks was not engaged in interstate commerce, and in so holding declared that the case was not distinguishable in principle from the Yurkonis case, *supra*. We see no distinction between the facts in the Harrington

case and the facts in the Yurkonis. In the Yurkonis case the coal in the act of being mined had not yet become an instrumentality of interstate commerce. And after coal has been mined and while it is being carried from one State into another it is in interstate commerce. It ceases to be in such commerce when it reaches its destination and is left on the storage tracks for sometime as in the Harrington case. Then the coal being out of interstate commerce does not again get into interstate commerce by the mere act of being moved from the storage tracks to another place on the tracks in front of the coal chutes. That was the act Harrington performed. The coal was still to be unloaded into the chutes and with that act Harrington was not engaged. In unloading the coal into the chute from which it was to be taken by the locomotives in interstate and intrastate commerce it became converted into an instrumentality of interstate commerce. The act of putting the coal into the chutes from which the engines can take it is an act performed in interstate commerce as much so as is the act of putting water into the trough by the side of the tracks to be scooped by passing engines. And we cannot distinguish the act of putting the coal into the coal chutes for the supply of the engines from the act of putting rails alongside of a track into which they are to be fitted or the bolts by the side of the bridge as in the Pedersen case."

The Court seems to have overlooked the fact that the very case which it supposes of putting rails alongside of a track came before this same Circuit Court of Appeals in 1917, and was decided not to be interstate commerce within the Federal Employer's Liability Act. *Hudson & M. R. Co. vs. Iorio*, 239 Fed. Rep., 855.

The distinction which the Court seeks in the last sentence above quoted is this: the bolts beside the bridge are appropriated to use in the maintenance of a road permanently devoted to commerce among the states.

According to this interpretation of the *Harrington* case, the Circuit Court of Appeals is of the opinion that because Harrington was only placing the coal where it could be supplied to the coal chutes and not actually engaged in placing it in the chutes he was not engaged in interstate commerce. It would seem that this Court in the case of *Lehigh Valley R. R. Co. vs. Barlow*, 244 U. S., 183, had decided otherwise.

In that case the plaintiff was engaged in actually placing supply coal on its unloading trestle, which would, we submit, be the same as placing it in coal chutes, and this Court following the decision in the *Harrington* case held he was not engaged in interstate commerce.

We respectfully submit that for the Circuit Court of Appeals to contend that, when coal is loaded into a coal chute where engines engaged in either interstate or intrastate commerce can obtain their supply, such coal is thereby converted into an instrumentality of interstate commerce, is absolutely opposed to the decision of this Court in the case of *M. & St. L. R. R. Co. vs. Winters*, 242 U. S., 353, where the Court said:

"Its character as an instrument of commerce depended upon its employment at the time, not upon remote possibilities or upon accidental later events."

While in the coal chutes the coal cannot be said to be an instrumentality of either kind of commerce, for it may be drawn to supply engines engaged in either interstate commerce or intrastate commerce. It might as well be argued that a new engine just out of the shops was converted into an instrumentality of interstate commerce because it might be used in that kind of commerce.

Then the Court, continuing, says that it cannot distinguish the act of so placing coal and the act of placing bolts by the side of a bridge, as in the *Pedersen* case.

We respectfully submit that it requires no fine-drawn line to find the distinction. In the first place, the coal when placed in the coal chute had not been designated for either interstate or intrastate commerce, but awaited the "remote possibilities or accidental later event" of being loaded into an engine engaged in either interstate or intrastate commerce. When it is so drawn from the chute it has then been converted into an instrumentality of commerce either intrastate or interstate, depending upon the character of the engine to which it has been supplied. The bolts in the *Pedersen* case, on the other hand, were specifically designated to go into the building of a bridge permanently devoted to interstate commerce. The difference between the two cases is, it seems to us, most clear.

So in the *Collins* case and so in the case at bar neither the *water* nor the *sand* had been converted into an instrumentality of interstate commerce, but were both dependent upon "accidental later events" before their character could be determined, and the plaintiff in the case at bar cannot, therefore, in view of the decisions of this Court in the *Harrington*, *Shanks* and *Winters* cases, be said to have been engaged in interstate commerce or in work so closely related to such commerce as said to be a part of it.

In support of its opinion the Circuit Court of Appeals for the Second Circuit cites two cases: *Grybowski vs. Erie Railroad Co.*, 88 N. J. L., 1 (1915), affirmed by Court of Errors and Appeals of New Jersey, and *Guida vs. Pennsylvania Railroad Co.*, 183 A. D. (N. Y.), 822 (July, 1918), affirmed by the Court of Appeals of New York without opinion, 224 N. Y., 712 (November, 1918).

In the *Grybowski* case the Court held that a person engaged in cleaning out an ash pit into which engines engaged in both interstate and intrastate commerce dumped ashes was engaged in interstate commerce.

The decision in that case seems to be in conflict with the later decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Southern Railway Co. vs. O'Dell*, 252 Fed. Rep., 540 (July, 1918) affirming 248 Fed., 343, where it was held that a man repairing an electric hoist used in hoisting ashes out of the ash pits where engines engaged in both interstate and intrastate commerce dumped ashes was not engaged in intrastate commerce.

In the *Guida* case the Court held that a man employed in cleaning the soot from twelve boilers that were a part of a plant consisting of 36 boilers, all of which were used in producing steam to operate dynamos which supplied power to both interstate and intrastate trains, was engaged in interstate commerce. The twelve boilers on which the man was working were permanently assigned to this work and had been temporarily withdrawn from service at the time of the accident.

The decision in *Guida* case does not support the decision of the Circuit Court of Appeals in the case at bar. The line of demarkation is clearly stated in the opinion of the Court in that case where it said:

"The electrical power was supplied to both railroads (one of which was an interstate road and one an intrastate road) through a common source furnishing an indivisible supply to operate both roads and was used in both interstate and intrastate commerce" (p. 823). "The work of the deceased related to the maintenance of an instrumentality per-

manently devoted to interstate commerce. * * * Keeping the boiler in effective condition was required in interstate and intrastate commerce" (p. 825).

This decision can be supported by the *Pedersen* case as the electric plant was a part of the physical railroad upon which trains employed in both interstate and intrastate commerce were constantly operated.

In spite of the fact that the long line of cases which we have cited should have pointed out the way to the Circuit Court of Appeals for the Second Circuit, particularly the *Harrington*, *Shanks* and *Cousins* cases, yet we find that Court ignoring the law as applied by this Court and basing its decision in the case at bar on two cases from the State Courts, one of which is in conflict with the decision of the Circuit Court of Appeals for another circuit, and the other of which is inapplicable.

Furthermore, this Court at the last term denied a writ of certiorari to review a decision of the New York Court of Appeals holding that a laborer injured while at work in coal pockets supplying both interstate and intrastate locomotives was not engaged in interstate commerce. *Galagher vs. N. Y. Central R. Co.*, 222 N. Y., 649, affirming 180 App. Div., 88, writ of certiorari denied Oct. 21, 1918.

The same result was reached in *Haley vs. Boston & Albany R. Co.*, 225 N. Y., 669.

It is submitted that the decision below cannot be sustained on the reasoning attempted, and is counter to all the principles construing and applying the statute as laid down by this Court.

POINT III.

The judgment and mandate of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 355.

ERIE RAILROAD COMPANY,

Petitioner,

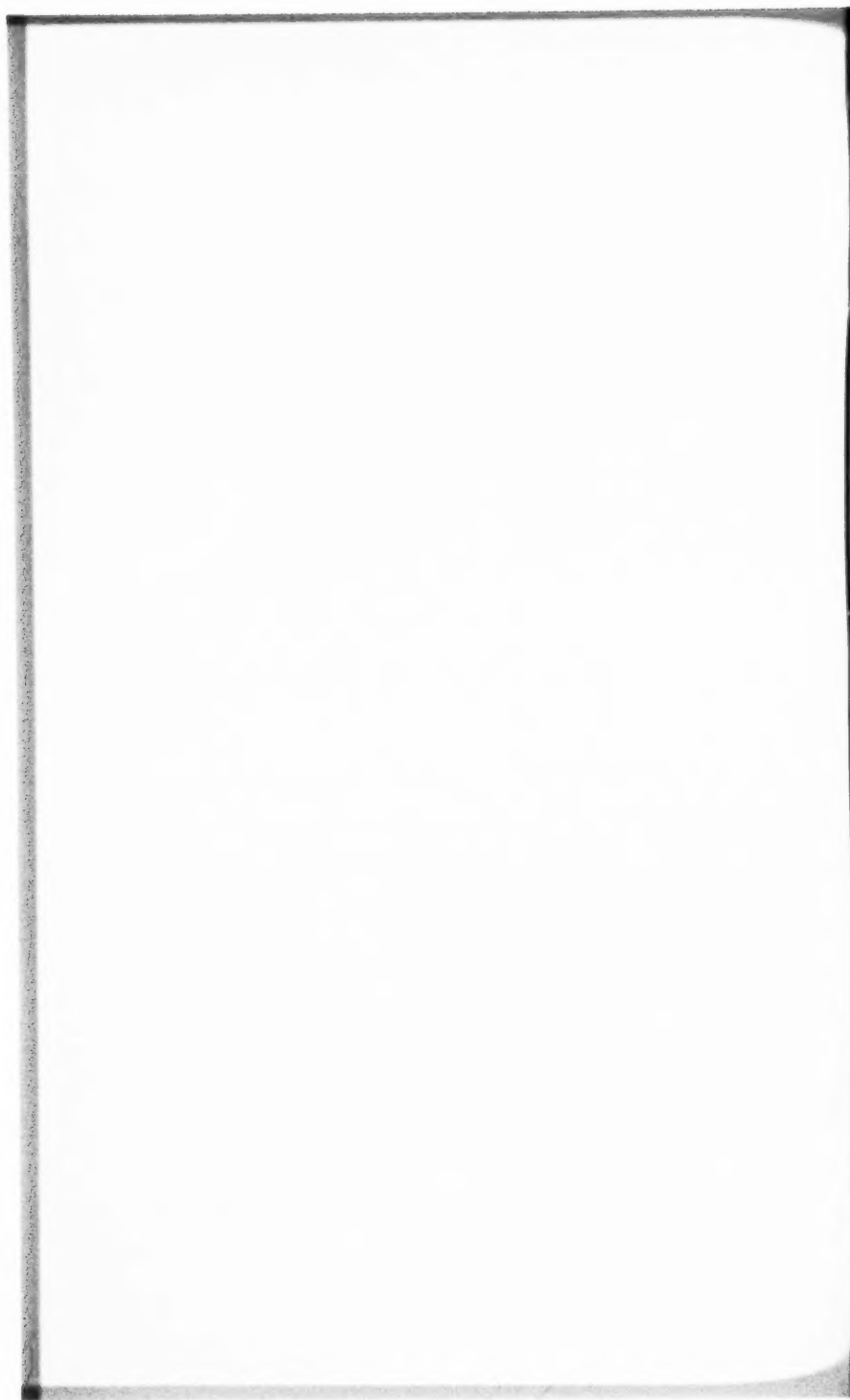
against

ANTONI SZARY,

Respondent.

**BRIEF ON BEHALF OF ANTONI SZARY,
RESPONDENT.**

JOHN C. ROBINSON,
Counsel for Respondent.



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Supreme Court of the United States

OCTOBER TERM, 1919.

No. 355.

ERIE RAILROAD COMPANY,
Petitioner,

against

ANTONI SZARY,
Respondent.

BRIEF ON BEHALF OF ANTONI SZARY, RESPONDENT.

Statement of Facts.

The action is under the Federal Employers' Liability Act to recover for personal injuries, including the loss of his leg, sustained by the respondent, who, while in the employ of the petitioner in its Jersey City yard, was run over by an engine running *detached and backward* (Transcript of Record, pp. 68-70), without any light on it (Transcript of Record, p. 26), and without ringing its bell, or giving any warning of its approach (Transcript of Record, pp. 26, 41), although the regular custom, and even the *rule* of the yard, required "the men on the engine, either firemen or engineers, to ring the bell as they came along that track at the particular point where Szary was run down" (Transcript of Record, p. 65).

The accident occurred about 9:30 p. m. (Transcript of Record, p. 22), on a dark and misty and foggy night (Transcript of Record, pp. 23, 41, 44, 47); a "nasty, rainy night"; "real dark"; so that it was difficult to see almost anything in the yard; even the lights did not show out well (Transcript of Record, pp. 65-66, 67-68).

Szary's employment was the preparation of the sand which is an essential part of the equipment of all locomotives, the placing of it in the locomotives, and the management and operation, including the cleaning of and the removal of the ashes from the "Big stoves" built for that purpose (Transcript of Record, p. 11), in which the sand was dried, drying being a necessary part of its preparation (Transcript of Record, p. 11).

When run over, Szary was crossing the track to get a pail which he was using in connection with the work of removing ashes from the stove. He had crossed the first rail of the track and was about to cross the other when "something hit me" (Transcript of Record, p. 30).

He was going for the pail while returning from "the engine room where the drinking water was," having gone there for the purpose of getting a drink of water (Transcript of Record, pp. 22, 28). The arrangement of the buildings and tracks was such that in going from the place where the drinking water was kept, to the ash pits where the pail was, it was absolutely necessary for him to cross the track on which he was run over. "I could not get there any other way * * * I had to cross the tracks" (Transcript of Record, pp. 22-23).

The *only* contention the petitioner makes in this Court is, "The plaintiff was not engaged in interstate commerce at the time of his injury, and the Federal Employers' Liability Act is not applicable" (Petitioner's Brief, p. 10).

In answering paragraph "Sixth" of the complaint, which is as follows:

"That all of said times and particularly at the time and place where plaintiff was injured, defendant was a common carrier by railroad engaged in commerce between several and different States of the United States and Territories and between several and different States of the United States and foreign nations" (Transcript of Record, p. 3),

the petitioner states in paragraph II of its answer (Transcript of Record, p. 4) as follows:

"it admits that at the times mentioned in the complaint defendant was a common carrier by railroad engaged partly in commerce between the several and different States of the United States and foreign nations, and partly in commerce wholly intrastate and more particularly wholly within the State of New Jersey" (Transcript of Record, p. 5).

Szary's duties in connection with his employment, as testified to by himself and Webb, the engine despatcher, were not disputed.

It was uncontradicted that sand, prepared in a certain way, which includes heating and drying it, is something that is absolutely necessary to have in any engine that is properly equipped (Transcript of Record, p. 9). "It is for starting out of stations; it is used on rails to start out of stations," and it is so placed in the engine that at the will of the engineer or fireman it can be dropped from the engine on the rails (Transcript of Record, p. 9). About thirty pails of this sand are placed in each engine (Transcript of Record, pp. 9-10).

Speaking of Szary and the nature of his employment, the engine starter testified that Szary prepared the sand; that in connection with this work he had to dry the sand in the stoves and to sieve it so as to take all the stones out of it; that before the sand was placed in the engines it was dried in "Big stoves" built for that purpose (Transcript of Record, p. 11), the stoves being heated by soft coal; that it was Szary's duty to feed these stoves with both sand and fuel and that as a part of his general work *it was his duty to keep these "Big stoves" clean*; that in order to do so he was obliged to remove the ashes of the burnt coal from the stoves, take them outside the sand house to an ash pit, and dump them there; and that in order to go to and from the ash pit it was necessary for him to cross the track on which he was run down (Transcript of Record, pp. 9-12).

There was a place for the men to get their drinking water a little distance from the sand house, and it was a regular thing for Szary and the others to go there for water. "That is something they did many times in the day and night in connection with the work" (Transcript of Record, pp. 12-13). Just before his accident, Szary had removed a pail of ashes from one of these "Big stoves" (Transcript of Record, p. 11), taken it to the ash pit, dumped it, left the empty pail at the pit, and gone to this place, and taken a drink of water. It was while returning to the pit for the ash pail that he was struck down by the locomotive (Transcript of Record, pp. 28-29).

Szary had been employed in the yard about three years (Transcript of Record, p. 19). Speaking of his work on the night of the accident, he says that he pre-

pared the sand, sifted it and put it into seven engines which "went to Chicago, and to Philadelphia, and to other States" (Transcript of Record, p. 21). Part of his work was to feed the fires and keep them burning. And it was also part of his nightly work to clean out the stoves, remove the ashes from them when the fires were burnt out, carry them to the ash pits and dump them there (Transcript of Record, pp. 19-21).

Q. * * * It was a part of your work to feed these fires and keep them burning, was it not?
A. Yes.

Q. And also a part of your nightly work to *clean out the ashes when the fire was burned out*, was it not? A. Yes.

Q. And a part of your nightly duty is to *take the ashes from the stove and carry them to what were known as the ash pits*, is that not so? A. Yes" (Transcript of Record, p. 20).

In describing the accident, Szary says that after he fed the last engine with sand, he cleaned out the "Big stove" (Transcript of Record, p. 21) and took the ashes from it over to the ash pit in a pail. In order to do this it was necessary for him to cross the railroad tracks (Transcript of Record, p. 63). "I could not get there any other way but to cross the tracks" (Transcript of Record, pp. 21-22).

When he got to the ash pit, he dumped the ashes, and then went "to the engine room, where the drinking water was" (Transcript of Record, p. 22) to get a drink. After getting it, he started to go back to the ash pit for the ash pail, and it was while recrossing the railroad track that he was run over (Transcript of Record, pp. 22, 23).

Webb, speaking of the sand, says: "They *daily* dry it and use it on the engines" (Transcript of Record, p. 54); that the sand was originally brought into the yards and passed along to Szary for the men in the sand house to work upon it, and that it was their work that got the sand ready for, and actually placed it in, the engines. That in addition he "*had to take care of the fires*" (Transcript of Record, p. 63) and *take the ashes out of the stove and carry them across the tracks to the ash pit* (Transcript of Record, p. 63).

SUMMARY OF ARGUMENT.

POINT I.

The evidence shows that Szary was, under the decisions of this Court, engaged in interstate commerce.

POINT II.

Cases cited by the petitioner distinguished.

POINT III.

It is not necessary, in order for him to obtain the benefit of the Federal Employers' Liability Act, that Szary should have been engaged in interstate commerce at the very instant of his injury.

POINT IV.

The judgment and mandate of the Circuit Court of Appeals should be affirmed.

POINT I.

The evidence shows that Szary was, under the decisions of this Court, engaged in interstate commerce.

The care, including the cleaning out, of these "Big stoves," built especially "for that work, to dry sand" (Transcript of Record, p. 11) to be used in interstate commerce, was certainly employment in interstate commerce, and on an "instrumentality" of such commerce.

The petitioner, throughout its brief, frequently asserts that the sand, the preparation of which was a part only of Szary's work, was in "storage" before it was prepared, and was put in "storage" after being prepared, and as a basis for this claim it cites the evidence that rough sand was brought into the yard every Sunday and remained there until it was used up, and that after being treated it was put into a bin. The process was to dry it in the "Big stoves" and then screen it (Transcript of Record, pp. 11, 20), after which it was placed in a bin (Transcript of Record, p. 11). The evidence compels the inference that once the prepared sand was placed in the bin, it was in constant movement into the different engines, and that there was never more than a supply sufficient for a day or so in the bin, for it appears that three "Big stoves" (Transcript of Record, p. 28) were in constant use in the preparing process (Transcript of Record, pp. 13, 19, 28), and that three men were engaged in it both day and night (Transcript of Record, pp. 13, 19). Webb, speaking of the sand, says "They *daily* dry it and use it

on the engines" (Transcript of Record, p. 54). The irresistible inference is that the sand as prepared by Szary was constantly moving into and out of the bin and that the placing of it in the bin, after being prepared, was the same as putting it in a pail or other receptacle for immediate use. There is no evidence that the prepared sand was "stored" in this bin, other than that it was placed there for immediate use.

The operation and care of the "Big stoves," which was absolutely necessary to this movement, was, therefore, very intimately and closely connected with interstate commerce.

Whether or not the *unprepared* sand was in "storage" before Szary screened and heated it in the "Big stoves" is immaterial. We contend that the care and effective maintenance of the "Big stoves," which was Szary's occupation at the time of his injury, was employment on a permanent instrumentality of interstate commerce.

In cases where the employee has been injured while working in connection with such instrumentalities of interstate commerce, this Court has always *held* that the employee came within the purview and fair intendment of the Federal Employers' Liability Act, even though the particular instrumentality was used for intrastate as well as for interstate commerce.

- Pedersen v. D. L. & C. R.*, 229 U. S., 146.
N. Y. Cent. R. R. vs. Carr, 238 U. S., 260.
Penna. R. vs. Donat, 239 U. S., 50.
Louisville R. vs. Parker, 242 U. S., 13.
Southern R. vs. Puckett, 244 U. S., 571.
N. Y. C. R. R. v. Porter, 249 U. S., 168.
Phila., B. & W. R. R. v. Smith, 250 U. S. 101.

In *Pedersen v. D., L. & R.*, 229 U. S., 146, this Court says that the true test is

"Is the work in question a part of the interstate commerce in which the carrier is engaged?"

And then adds:

"Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not, as yet, become instrumentalities in such commerce, *but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their work as such.*" (Italics ours.)

In *N. Y. Cent. R. vs. Carr*, 238 U. S., 260, the Court said:

"Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, *or in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereto.*" (Italics ours.)

And in *Shanks vs. D., L. & W. R.*, 239 U. S., 556, this Court asks:

"Was the employee at the time of the injuries engaged in an interstate transaction or *any* work so closely related to it as to be practically a part of it?" (Italics ours.)

From these cases, illustrating the general principle applicable, it is certain, we submit, that Szary at the time of his injury was employed in interstate commerce, in that he had charge of, and was actually working upon, *stationary and permanent instrumentalities of interstate*

commerce, namely, the "Big stoves" built especially for the purpose, which it was absolutely necessary, in the conduct of such commerce, to keep in order, for the sole purpose of preparing the sand and getting it in condition to place in the different locomotives or engines into which it was continuously passing. At the very moment of the accident he was working in connection with one of these instrumentalities.

It is respectfully submitted that Szary, at the time of his injury, WAS engaged in interstate commerce, and that the Federal Employers' Liability Act IS, therefore, applicable.

The care and management of these "Big stoves" built especially for the purpose (Transcript of Record, p. 11) of preparing sand to be used in interstate commerce, including the removal of the ashes from the stoves, was employment in such commerce, and on an "instrumentality" of such commerce, and such employment is fairly within the intendment of the statute.

The very recent case of *Philadelphia, Balt., etc., R. vs. Smith*, 250 U. S. 101, was decided chiefly on the principles laid down in the *Pedersen* case, and is ample authority for the affirmance of the judgment in the case at bar. Smith, whose duties were to cook meals, make the beds, etc., for a gang of bridge carpenters in a camp car provided by the railroad and moved from place to place on the line, at the time of his injury was within the car on a side track, cooking a meal for himself and the carpenters, the food for which was provided by the men themselves, while they were repairing one of the bridges in the vicinity. This bridge was used by trains engaged in both interstate and intrastate commerce. *This*

Court held that Smith at the time of his injury was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

In that case this Court, instead of limiting the applicability of the principles enunciated in the *Pedersen* case, as petitioner states in its brief at page 25, reaffirms those principles, and, we believe, even extends their applicability in holding that Smith, who was not even engaged in the work of repairing the bridge, and whose connection with interstate commerce was much more remote than that of Szary in the case at bar, was engaged in interstate commerce within the meaning of the Act.

Certainly, the case at bar is in all particulars very much stronger than the *Smith* case. Szary, in the work of keeping the "Big stoves" in effective working order, was actually—personally—engaged in the care and maintenance of a permanent and fixed instrumentality of interstate commerce; was actually engaged in the facilitation of interstate transportation—in the preparation of the sand without which not a single engine could have left the yard, whereas Smith's position was similar to that of a person who might cook and prepare food for Szary and the men working with him, and was at least one degree or link further removed from the actual instrumentality of interstate commerce.

In *Roush vs. Baltimore & Ohio R. R. Co.*, 243 Fed., 710, 713, it was held that an employee engaged in operating a pump which furnished water indiscriminately to engines engaged in both intrastate and interstate commerce was engaged in interstate commerce within the meaning of the Act.

In *Guida v. Pennsylvania Railroad*, 183 App. Div., 822, affirmed by the New York Court of Appeals (No-

vember, 1918) and reported in 224 N. Y., 712, an employee was injured while cleaning soot from a boiler in the power plant of a railroad company generating electricity for the operation of trains on two railroads, one wholly in New York State, and the other partly in New York and partly in New Jersey. It was *held* that the plaintiff came within the Federal Employers' Liability Act, the Court there saying:

"That statute speaks of interstate commerce, not in a technical legal sense, but in a practical one, making the true test of such employment whether the employee at the time of the injury was engaged in interstate transportation, or in a work so closely related to it as to be practically a part of it."

The petitioner attempts to distinguish this case from the case at bar, but we submit that the very language cited by it at page 30 of its brief is applicable here, the only difference being that in that case the injured man was cleaning soot from the boilers, while here Szary was cleaning ashes from the "Big stoves," built especially for the purpose of preparing the sand (Transcript of Record, p. 11).

"The work of deceased related to the maintenance of an instrumentality permanently devoted to interstate commerce. * * * Keeping the boiler in effective condition was required in interstate and intrastate commerce."

In *Sells v. Grand Trunk &c. R.*, 206 Ill. App., 45, an engineer who was injured while repairing a hoist used to fill coal boxes from which locomotives engaged in both kinds of commerce were coaled, was *held* to be within the Act (Certiorari denied by the Supreme Court).

Szary, at the very instant of his injury, was really engaged in that part of his work that had to do with the cleaning of the stores in which the sand was made ready for use in interstate commerce.

These "Big stoves" (Transcript of Record, p. 11) had nothing transitory or changing about them. They were "permanent instrumentalities" of interstate commerce. "They were built for that" (Transcript of Record, p. 11), i. e., preparing the sand for interstate commerce.

The sand prepared in them was an absolute necessity of the railroad in the conduct of its interstate traffic (Transcript of Record, pp. 9-10). The "Big stoves" by and in which it was prepared, and through which it was continuously passing, were *necessary, permanent and stationary instrumentalities of interstate commerce*, just as much so as were tracks, bridges, round houses, road beds, switches, signal devices, pump houses, water tanks, etc.

In every case where an employee has been injured while working in connection with such instrumentalities of interstate commerce, it has been held by this Court that the employee came within the purview and fair intendment of the Federal Employers' Liability Act, even though the particular instrumentality was used for intrastate, as well as interstate, commerce.

POINT II.

Cases cited by the petitioner distinguished.

All of the cases in this Court cited by the petitioner are clearly distinguishable from the one at bar. They may be grouped under two headings: (a) those where the injury was sustained while plaintiff was in the act of taking some commodity, which *might* be used in interstate commerce, from "storage," or putting it into "storage"; and (b) those where the injury was sustained while repairing or working upon some object such as an engine, car, etc., which was *not* "permanently" devoted to interstate commerce, or so closely connected with it as to be a part of it.

It is respectfully submitted that the case at bar does not come under either of these classifications. (See Respondent's Brief, Statement of Facts and Point I.)

(a) Cases where the injury was sustained by plaintiff while in the act of taking some commodity, which *might* be used in interstate commerce, from "storage," or putting it into "storage."

C. B. & Q. R. v. Harrington, 241 U. S., 177; *D., L. & W. R. v. Yurkonis*, 238 U. S., 439, and *Lehigh Railroad v. Barlow*, 224 U. S., 183, were all cases arising out of injuries in the handling of coal. There was no proof in any one of them that the general employment of the plaintiff was interstate, or that the injury was sustained by the plaintiff while engaged in connection with a "permanent instrumentality of interstate commerce," as is the fact in the case at bar.

In the *Yurkonis* case the coal was simply being mined. It was said that

"the mere fact that the coal might be used, or was intended to be used, in the conduct of interstate commerce, or the fact that the same was mined for transport did not make the injury received by the plaintiff one received while he was engaged in interstate commerce."

Of course, the miner had no interstate employment as did Szary in the case at bar. Generally speaking, he simply mined the coal. The contention that the employment was interstate would be based entirely upon the interstate quality of the coal at the time, and it had none. Neither had the mines or the miners. There was no certain or immediate use of the coal in interstate commerce in view. It might be so used, and it might not. In the case at bar, however, the use of the "stove," a "permanent instrumentality" for the drying of the sand that was continuously passing into interstate locomotives, was both certain and immediate.

In the *Barlow* case the employee was engaged as a member of a switching crew in assisting in placing on an unloading trestle in the yard coal cars belonging to the company, loaded with supply coal for it, *which had remained in the yards upon sidings for several days* before removal to the trestle. It was sought to make the employment interstate because the coal had been brought from without the State. It was *held* that this interstate function had ended several days before, the Court saying:

"We think their interstate movement terminated before the cars left the siding, and that while removing them the switching crew was not employed in interstate commerce."

To the same effect is the decision in the *Harrington* case.

In both of those cases the coal was being put in storage, from which it could be taken when required for use, and is, we submit, distinguishable from the *Szary* case, where the sand was constantly being put in the engines, practically as soon as it was prepared (Transcript of Record, p. 54), and requiring the work of three men day and night to keep three "Big stoves" always in operation drying the sand (Transcript of Record, pp. 13, 19, 28).

Szary, at the time of his injury, was actively engaged in his work (Transcript of Record, p. 20). He was in the act of returning to the sand house with the ash pail in which he had removed the ashes from the "Big stoves"—the "permanent instrumentality" of interstate commerce.

(b) Cases where the injury was sustained while repairing or working upon some object, such as an engine, car, etc., which was *not* "permanently" devoted to interstate commerce, or so closely connected with it as to form a part of it.

In *Shanks vs. Del., L. & W. R. R.*, 239 U. S., 556, plaintiff was injured while taking down and putting in another place a shop fixture, through which power was communicated to some of the machinery used for repairing parts of engines, some of which were used in interstate commerce. The distinction in that case is that an engine is not a "permanent instrumentality" engaged in interstate commerce and that its repair cannot be said to be closely connected with such commerce. Its use in transportation ceases when its work is done, and it

may be used in either interstate commerce or intrastate commerce thereafter, and is not like the "Big stoves" in the case at bar, which were "permanent instrumentalities" of interstate commerce, constantly being used (Transcript of Record, p. 54) in facilitating transportation between the States.

For the same reason the case of *Illinois Central R. Co. v. Cousins*, 241 U. S., 641 (Petitioner's Brief, p. 17), is to be distinguished from the case at bar. In that case the plaintiff was wheeling coal to one of the car repair shops. The coal was to be used in heating the shop. The cars which were being repaired in the shops were not "permanent instrumentalities" devoted to commerce among the States.

To the same effect is the case of *Baltimore & O. R. Co. vs. Branson*, 242 U. S., 623 (Petitioner's Brief, p. 18), where plaintiff was engaged in painting cars and engines not then actually engaged in transportation.

In *Hudson & Manhattan R. Co., vs. Iorio*, 239 Fed. Rep., 855 (Petitioner's Brief, p. 14), the plaintiff was engaged in storing rails in a pit against the time when they might be required for track repairing or any other purpose. The Court in that case said:

"It cannot be said that the rails which Iorio was engaged in storing against a use that was certainly not imminent, and might never occur, was at the moment engaged in or practically part of interstate commerce, for that commerce was going on without any present assistance either from Iorio, or the rails on which he was working, or the men who were working with him."

It certainly cannot be said that Szary's work could be thus characterized, because while Iorio was *not* performing work even closely connected with interstate commerce, Szary, in cleaning and properly maintaining the "Big stoves," *was* actually engaged on an instrumentality, permanently and continuously devoted to such commerce.

POINT III.

It is not necessary, in order for him to obtain the benefit of the Federal Employers' Liability Act, that Szary should have been engaged in interstate commerce at the very instant of his injury.

We contend that Szary, in going for the pail, was really engaged in the act of cleaning and maintaining the "Big stoves." That his going for it was substantially a part of that act, or at least most closely connected with it. But under the decisions of this Court it would not be necessary to so find in order to sustain this judgment.

At page 15 of Petitioner's Brief, under subdivision (2) of its point, the statement is made that

"On the night of the accident the plaintiff had cleaned the stove, removed the ashes (fol. 96), taken them over and dumped them into the ash-pit. After dumping the ashes in the ashpit he set the pail down and recrossed the track to the engine house, where he got a drink of water. When on the way back to the ashpit to get the pail he was run over and injured. So at the *time* of his injury he was not even engaged in removing ashes from the stove, etc."

We shall answer this plea for such a narrow and illiberal construction of the Act by citing the very appropriate language of the Court of Appeals of the State of New York in its decision in *Knowles vs. N. Y., N. H. & H. R. R.*, 223 N. Y., 513, following the law on this subject as laid down by this Court in *Erie Railroad vs. Winfield*, 244 U. S., 170:

"While the test is the nature of the work done at the time of the injury, the Supreme Court has held (*North Carolina R. R. Co. vs. Zachary*, 232 U. S., 248) that this rule is not to be construed so narrowly as to require the servant to be actually engaged in work connected with interstate commerce at the precise moment when the accident occurs. If that is his general employment, his temporary absence while still on his employer's premises, not inconsistent with his duties, is immaterial. A later case (*Erie Railroad vs. Winfield*, 244 U. S., 170, 173) is, however, decisive in principle of the question before us. A servant having finished his work and in leaving the railroad yards was killed. It was held that he had been employed in interstate commerce, and the Court said: 'In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole.'

So, in walking through his employer's yards to reach his place of work with that purpose solely in view, and with the time when that work must begin closely approaching, he is performing a duty which his master requires of him, a necessary incident to his work, and when killed under such circumstances it would be a narrow construction to hold that, in the language of the federal statute, he is not then 'employed by such carrier in such commerce.'"

How much stronger is the case at bar than the case in which this language was used. Szary at the time of his injury was actively engaged in his work (Transcript of Record, pp. 20, 21). He was in the act of returning to the sand house with the ash pail in which he had removed the ashes from the "Big stoves" built for that purpose—the necessary and "permanent instrumentalities" of interstate commerce, and without which a locomotive could not have left the yard.

POINT IV.

The judgment and mandate of the Circuit Court of Appeals should be affirmed.

JOHN C. ROBINSON,
Counsel for Respondent.

ERIE RAILROAD COMPANY v. SZARY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

No. 355. Argued January 8, 1920.—Decided May 17, 1920.

An employee of a railroad engaged in both interstate and intrastate commerce, whose duty it was to dry sand in stoves in a small structure near the tracks and supply it to the locomotives, whether operating in the one kind of commerce or the other, was injured while returning from an ash-pit whither he had gone to dump ashes taken by him from one of the stoves after sanding several locomotives bound to other States. *Held*, employed in interstate commerce within the meaning of the Federal Employers' Liability Act. P. 89.

Erie R. R. Co. v. Collins, ante, 77, followed.

259 Fed. Rep. 178, affirmed.

THE case is stated in the opinion.

Mr. Theodore Kiendl, Jr., with whom *Mr. William C. Cannon* and *Mr. Coulter D. Young* were on the brief, for petitioner:

Plaintiff's duties as sand-drier, apart from actually delivering sand to an engine, may be divided into (1) preparing the sand for storage, and (2) caring for the stove and fire with which the sand was prepared for storage.

It seems clear that the preparation of the sand for, or placing it in, storage would not constitute interstate commerce. Cf. *Chicago, Burlington & Quincy R. R. Co. v. Harrington*, 241 U. S. 177.

If the plaintiff had been placing the dried sand in storage he would have been engaged in the same kind of work as *Harrington* was, not interstate commerce. But the plaintiff here was even more remote from an act of interstate commerce, for he was, at best, engaged in work which was antecedent to putting engine materials into storage, viz., the work of caring for the fire which prepared the sand for storage. Cf. *Lehigh Valley R. R. Co. v. Barlow*, 244 U. S. 183; *Hudson & Manhattan R. R. Co. v. Iorio*, 239 Fed. Rep. 855; *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353.

As to the other phase of the plaintiff's employment: At the time of his injury he was not even engaged in removing the ashes. But assuming that his act was a part of his cleaning the stove, it did not have to do with any interstate operation. *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556.

It would seem that the nearest the plaintiff came to being engaged in interstate commerce at the time of his injury was in removing ashes from a fixture. To paraphrase the language in the *Shanks* opinion, the connection between the fixture and the interstate transportation was remote at best, for the only function of the fixture was to convey heat to sand which was placed in storage and then used in supplying engines, some of which were used in interstate transportation. All this stove was used for was heating and drying of sand as it was moved from storage to storage and such a use cannot be said to make it an instrument of interstate commerce, as the sand which was prepared might never have been used in such commerce. *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439.

There is no conceivable way in which the plaintiff can be held to have been employed in interstate commerce unless we are to disregard the decisions in the *Harrington*, *Yurkonis* and *Shanks Cases*. See also *Illinois Central R. R. v. Cousins*, 241 U. S. 641; *Baltimore & Ohio R. R. Co. v. Branson*, 242 U. S. 623; *Southern Ry. Co. v. Pitchford*, 253 Fed. Rep. 736; *Giorio v. New York Central R. R. Co.*, 176 App. Div. 230; 223 N. Y. 653; *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473; *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353; *O'Dell v. Southern Ry. Co.*, 248 Fed. Rep. 345.

Mr. John C. Robinson for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action for damages under the Employers' Liability Act, for the loss of a leg in the railroad company's service. The verdict and judgment were for \$20,000. The contest in the case is whether the injury was received in interstate or intrastate service.

The judges below concurred in the judgment but disagreed upon the grounds of it. Judges Hand and Hough concurred on the authority of the *Collins Case* (259 Fed. Rep. 172), though Judge Hand did not sit in it, and Judge Hough dissented from its judgment.

As we have just affirmed that case, if it is not distinguishable from the case at bar, the latter must also be affirmed. A distinction is not asserted but both cases are attacked. In our opinion in the *Collins Case*, *ante*, 77, we have reviewed most of the cases upon which the company relies in this, and whether their principle applies depends upon the facts. We collect them from the testimony and represent them as the jury had a right to consider them, omitting conflicts.

86.

Opinion of the Court.

Sand is necessary to an engine and must be used dry. Szary and two others were employed in its preparation, which was done in what is called the "sand house," a small structure standing in the yards of the company along side of the tracks. The drying was done in four large stoves which it was the duty of Szary and his associates to attend. Soft coal was the heating means and the resulting ashes were dumped in an ash pit, to do which a track had to be crossed.

On the night of the accident, January 5, 1917, Szary began his duties at 6 o'clock, and sanded about seven engines whose destinations were other States. He sanded the last engine at 9 o'clock, and after doing so, he removed the ashes from the stove and carried them to the ash pit in a pail according to his custom; in doing which he was compelled to cross one of the tracks. He emptied the pail and left it on the ground while he went to the engine-room to get a drink of water, and when returning for the pail and crossing the track he was hit by an engine. He had looked and saw no engine and heard no signal. He described the night as "very dark and very foggy and rainy and misty," and testified that he could not see anything, the steam and smoke from the engines in all parts of the yard being so thick that he could see nothing.

The engine that hit him was running backwards and without a light. He was picked up and carried to a hospital and his left leg was amputated the same night from two to three inches below the knee.

We think these facts bring the case within the *Collins Case* and the test there deduced from prior decisions. There were attempts there, and there are attempts here, to separate the duty and assign it character by intervals of time, and distinctions between the acts of service. Indeed something is attempted to be made of an omission, or an asserted omission, in the evidence, of the kind of commerce in which the last engine served was engaged.

The distinctions are too artificial for acceptance. The acts of service were too intimately related and too necessary for the final purpose to be distinguished in legal character.

The conclusion that the service of Szary was rendered in interstate commerce determines the correctness of the ruling of the District Court upon the motion to dismiss made at the close of plaintiff's evidence, and afterwards for particular instructions and the objections to the charge by the court. All of the rulings were based on the character of the commerce, the court adjudging it to be interstate.

It hence follows that the judgment must be and it is

Affirmed.

MR. JUSTICE VANDEVANTER and MR. JUSTICE PITNEY
dissent.
